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*Blackstone, Sir William*  
**THE  
PRINCIPLES  
OF  
THE LAW  
OF  
REAL AND PERSONAL PROPERTY;**

**BEING  
THE SECOND BOOK  
OF  
Blackstone's Commentaries :  
INCORPORATING THE  
ALTERATIONS DOWN TO THE PRESENT TIME.**

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**Third Edition,  
REVISED, AND GREATLY ENLARGED.**

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**BY  
JAMES STEWART,  
OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.**

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TO  
THE RIGHT HONOURABLE  
JOHN LORD CAMPBELL,  
TO WHOM  
THE PROFESSION AND THE PUBLIC  
ARE CHIEFLY INDEBTED  
FOR THE RECENT STATUTES PASSED FOR THE IMPROVEMENT OF  
THE LAW OF PROPERTY,  
THIS VOLUME,  
INTENDED TO ILLUSTRATE THEIR OBJECTS AND EFFECT,  
IS RESPECTFULLY DEDICATED,  
BY  
HIS MOST OBLIGED AND OBEDIENT SERVANT,  
JAMES STEWART.



## ADVERTISEMENT

### TO THE THIRD EDITION.

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THE Editor has now the pleasure of offering a Third Edition of this Volume to the Profession. Of the two previous editions more than the usual number was printed, and as these have been speedily exhausted, he has the satisfaction of thinking that the plan on which they have been edited has met the approbation of the Profession. He has spared no pains to render this edition more worthy of it. The numerous statutory alterations in the law since the last edition have been incorporated into the work, as well as those cases which, according to the opinion of the Editor, should find a place in an elementary work as making important variations of, or additions to, the law.

The Editor has also revised the whole text of this volume with much care, and has added very considerably to the text of the former editions. It has been his endeavour throughout to preserve most studiously the original design and arrangement of Blackstone, and to make such additions and alterations only as it may be supposed he would have made; and acting in this spirit, the Editor has thought it proper, considering the recent important statutes on the subject, to expand Blackstone's incidental mention of copyholds, (which he has considered under the head of estates at will,) into a separate chapter, "Of Estates by

Custom," being chapter the eleventh of this volume, which he trusts may not be unacceptable to the reader.

The references to the original text of Blackstone have also been carefully examined, and it is believed they will now be found to be correct.

The first volume is referred to throughout this volume as *The Rights of Persons*, the third as *Private Wrongs*, and the fourth as *Public Wrongs*. *The paging referred to is the original paging of Blackstone, and will thus suit any edition.*

4, Lincoln's Inn Old Square,  
April 15th, 1844.



# INTRODUCTION

TO THE FIRST EDITION.

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THE principles which govern the enjoyment and the alienation of Real and Personal Property are of almost universal interest. Some acquaintance with them is requisite for managing, with safety and propriety, many of the common occurrences of life; and a familiarity with them will perhaps be found more useful than any other branch of legal learning.

The second volume of Mr. Justice Blackstone's Commentaries has long been recognized as the most popular introduction to a knowledge of this subject. Its publication may be said to have formed an era in the history of the Law of Property. It rendered this most difficult body of law comparatively easy of comprehension, and it is constantly referred to by all classes of the community, and more particularly by the law student, for information respecting it. The only drawback at the present day to its practical use—obviously a great one—is, that since it was written the law relating both to Real and Personal Property has been materially altered, both by the legislature and by judicial decision. Indeed, in many parts of this volume, the Commentaries must now be considered chiefly valuable rather as containing a history of the law down to the time of the author, and as an exposition of what the law then was, than as showing how it stands at the present day. Still, however, in those parts which have not been altered, this work remains unrivalled for clearness and accuracy, and for conveying all that for general purposes need be known, in a style the most beautiful, and with an authority inferior to none.

Under these circumstances it seemed worthy of consideration whether the work might not be adapted to present use, by incorporating the alterations which have been made since it was written ; thus endeavouring to render it what it was originally,—a brief but authentic statement of this branch of the law. In pursuance of this idea,—which the writer may take the liberty of stating has long been a favourite one with him—this volume was undertaken.

If any precedent were necessary for separating a portion of a legal work from the rest, and making it a distinct work, he may be permitted to refer to one of the most popular text-books in the profession—Coke upon Littleton, which, it need hardly be stated, forms the first of Lord Coke's Institutes, and has long been in general use in a separate form, with annotations by various editors. Indeed much convenience may be found in separating the volumes of Blackstone for practical use, and rendering each complete in itself.

Having said thus much on the general design, the writer has now to request attention to the particular alterations he has made in the text of Blackstone.

These it was at one time intended to have shown by brackets or other distinctive marks, and this would have been greatly preferred ; but after much consideration this plan was abandoned, as almost every page being altered, it appeared likely to perplex the reader, especially the student. All that has been done, therefore, is to insert in the side margin, a reference to the page of Blackstone, by attending to which it may easily be seen, if desired, what alterations and additions have been made ; and this perhaps will be found a useful practice for the student.

All that is attempted in this work, is to fix the Principles of the present Law of Real and Personal Property. It has been endeavoured by the present writer to make as few alterations in the text as possible ; and those that

have been made, although they have been supported by authorities, are proposed with great diffidence. The only transposition which the writer found himself called on to make, was, to bring the subject of Uses and Trusts into a separate and early chapter, instead of leaving it to be introduced incidentally in the chapter on Alienation by Deed. He considers himself justified in doing this, inasmuch as the doctrine of Uses and Trusts pervades the whole law of Real Property, and few parts of it can be rightly understood without some knowledge of this doctrine. It would have been easy to have enlarged many parts of the work ; and the writer was much tempted to do this, especially in the chapter on Uses and Trusts. It was thought better, however, on the whole, to leave the work, where it continues unaltered, as it was, and to refer the reader to other books for information.

The writer cannot offer this work to the public without great diffidence. He can only console himself against any charge of presumption which may be made against him, with the thought that he has sincerely endeavoured to smooth the way of the student, to whom he now begs to address the encouraging words quoted from Lord Coke by Blackstone at the close of his inquiries on the law of Real Property : “ Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed, for on some other day, in some other place,” (or perhaps, adds Blackstone, upon a second perusal of the same,) “ his doubts will be probably removed.” \*

\* Proeme to 1st Instit.



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## ERRATA ET CORRIGENDA.

- Page 92, line 2, *for demolished, read abolished.*  
 270, — 20, *for consanguineous, read consanguineus.*  
 384, — 30, } *for rarely or ever, read rarely or never.*  
 420, — 25, }  
 558, — 29, *for is, read in.*  
 579, — 8, *for be, read he.*

# PRINCIPLES

OF THE

## LAW OF PROPERTY.

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### CHAPTER THE FIRST.

#### OF PROPERTY IN GENERAL.

THE objects of our inquiry in this volume will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

Rights of things, or rights of dominion.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at least we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying

Their origin.  
[ 2 ]

owner ; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land ; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him ; or why the occupier of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

Founded in  
the will of  
the Creator.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth ; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."<sup>a</sup> This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been startled by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life ; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity : as may be collected from the manners of many American nations when first discovered by the Europeans ; and from the ancient method of living among the first

<sup>a</sup> Gen. i. 28.

Europeans themselves, if we may credit either the memoirs of them preserved in the golden age of the poets, or the uniform accounts given by the historians of these times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset.*"<sup>b</sup> Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer:<sup>c</sup> or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might [ 4 ] seize it, without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own.<sup>d</sup>

Communion of goods in the earliest ages to what confined.

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually

Necessity caused not only the *use* but the *substance* also to be appropriated to individuals.

<sup>b</sup> Justin. l. 43, c. 1.

<sup>c</sup> Barbeyr. Puffr. l. 4, c. 4.

<sup>d</sup> Quemadmodum theatrum, cum

*communis sit, recte, tamen dici potest, ejus esse eum locum quem quisque occupavit. De Fin. l. 3, c. 20.*

gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home stall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil; partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

[ 5 ]

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent dis-

appointments incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well." And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace.<sup>f</sup> [ 6 ]

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline

Land remained longest in common.

<sup>e</sup> Gen. xxi. 30.

<sup>f</sup> Gen. xxvi. 15, 18, &c.

of the Roman Empire.<sup>a</sup> We have also a striking example of the same kind in the history of Abraham and his nephew Lot.<sup>b</sup> When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants, so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right in either to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well-watered every where, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan."

[ 7 ] Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants, which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit,

<sup>a</sup> *Colunt discreti et diversi; ut fons, ut campus, ut nemus, placuit. De mor. Ger. 16.*

<sup>b</sup> Gen. c. xiii.



without encroaching upon former occupants; and by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the produce of his industry, art, and labour? Had not, therefore, a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has Providence interwoven our duty and our happiness together), the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property, and, in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, governments, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all: and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how this property became actually vested: or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary

The necessity of providing subsistence introduced agriculture, which established a permanent property in the soil.

[ 8 ]

Civil society necessary for the protection of property.

The right to the permanent property in the soil, thus became vested by occupancy.

use of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes every one else but the owner from the use of it. There is, indeed, some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorff insisting that this right of occupancy is founded on a tacit and implied sense of all mankind that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use, such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

[ 9 ]

Property thus acquired by the first taker, remained in him till he showed an intention to abandon it, and then it once more became common.

Property, both in land and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses or drops it by accident, it cannot be collected from thence that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who

may claim it again of the finder. And this, we may observe, is the doctrine of the law of England, with relation to treasure trove.<sup>1</sup>

But this method, of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession or occupancy, confirms that right against all the world besides.

The most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he

Mutual convenience and the interests of civil society introduced the transfer of property.

[ 10 ]

Sale, or conveyance.

And also by will.

<sup>1</sup> See Rights of Persons, [296.]

ceases to have any dominion : else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him ; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society : for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will ; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir, of the deceased ; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion.<sup>k</sup> And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country ; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance recognised earlier than the right to devise.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side ; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment ;

<sup>k</sup> It is principally to prevent any vacancy of possession, that the civil law considers father and son as one person ; so that upon the death of

either, the inheritance does not so properly descend, as continue in the hands of the survivor. *Ff.* 28, 2, 11.

since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir."<sup>1</sup> [ 12 ]

While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions, properly *witnessed* and authenticated, according to the *pleasure* of the deceased; which we therefore emphatically stile his *will*. This was established in some

When property became inheritable, the heir-at-law was at first incapable of exclusion by will; but this being found inconvenient, gave rise to the right of disposing of it by will.

<sup>1</sup> Gen. xv. 3.

Until after the restoration, the power of devising real property not universal. Wills, &c. regulated by the civil or municipal laws.

countries much later than in others. With us in England, till modern times, a man could only dispose of one third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth: and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present.

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more than the right of inheritance under different national establishments. In

[ 13 ] England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates, the father may succeed to his children; but in landed property until very lately,<sup>m</sup> he never could be their immediate heir, by any the remotest possibility: in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *one* witness instead of *two*, which the law now requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon

<sup>m</sup> 3 & 4 W. 4, c. 106, and *post*, Chap. XVI.

very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in [ 14 ] defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation as the right of the devisee would have been, supposing such requisites were observed.

But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition: which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Light, air, water, and animals, *feræ naturæ*, being such wherein nothing but an usufructuary property can be had, remain common.

Forests,  
waste lands,  
&c.

Again ; there are other things, in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance ; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands ; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known  
[ 15 ] appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of discussion, by vesting the things themselves in the sovereign of the state : or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.



## CHAPTER THE SECOND.

OF REAL PROPERTY; AND FIRST, OF COR- [ 16 ]  
POREAL HEREDITAMENTS.

THE objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds; things *real*, and things *personal*. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements, and the rights and profits annexed to or issuing out of these: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he may think proper to go.

Property divided into things real, and things personal.

In treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

Things real. Division of the subject.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. This *liberum tenementum*, franktenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like;\* and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other

Things real consist of land-tenements,

[ 17 ]

\* Co. Litt. 6 a.

and hereditaments.

property of the like unsubstantial kind, are, all of them, legally speaking, tenements.<sup>b</sup> But an *hereditament*, says Sir Edward Coke,<sup>c</sup> is by much the largest and most comprehensive expression: for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal, or mixed. Thus an heir-loom, or implement of furniture which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.<sup>d</sup>

Hereditaments are of two kinds, corporeal and incorporeal.

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments; of what they consist.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke,<sup>e</sup> comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings: for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon: so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water, by the name of *water* only, either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a water-course, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres

[ 18 ]

Land; its signification, and what will pass under it.

<sup>b</sup> Co. Litt. 6 a. 20 a.

<sup>c</sup> Co. Litt. 6 a.

<sup>d</sup> 3 Rep. 2.

<sup>e</sup> Co. Litt. 4 a.

of *land covered with water*.<sup>f</sup> For water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries, except where there is a custom to the contrary.<sup>g</sup> So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in [ 19 ] the instance of water; by a grant of which, nothing passes but a right of fishing:<sup>h</sup> but the capital distinction is this; that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass.<sup>i</sup>

<sup>f</sup> Brownl. 142.<sup>h</sup> Co. Litt. 4.<sup>g</sup> *Curtis v. Daniel*, 10 East, 273.<sup>i</sup> *Ibid.* 4, 5, 6.

## CHAPTER THE THIRD.

## [ 20 ] OF INCORPOREAL HEREDITAMENTS.

Incorporeal  
heredita-  
ments : what  
they are.

AN incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exerciseable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like ; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled : incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance ; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation : though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament : for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal ; yet they are indeed incorporeal hereditaments : for they, being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense ; that casual share of the an-

[ 21 ]

nual increase is not, till severed, capable of being shewn to the eye, nor of being delivered into bodily possession.

Incorporeal hereditaments are principally of ten sorts; Of ten sorts. advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

I. Advowson is the right of presentation to a church, or ecclesiastical benefice. Advowson, *advocatio*, signifies in *clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, (from whence, as was elsewhere mentioned,<sup>b</sup> arose the division of parishes,) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron.<sup>c</sup>

1. Advowson:  
Definition of.

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages; but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession be had of it. If the patron takes corporal possession of the church, the churchyard, the glebe, or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by deed, which is a kind of invisible mental transfer: and it being so vested, it lies dormant and unnoticed, till occasion calls it forth: when it produces a visible, cor-

Nature of an  
incorporeal  
heredita-  
ment.

[ 22 ]

<sup>b</sup> Rights of Persons, [112.]

<sup>c</sup> This original of the *jus patronatus*, by building and endowing the church,

appears to have been allowed in the Roman empire. Nov. 26, t. 12, c. 2. Nov. 118, c. 23.

poreal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter and receive bodily possession of the lands and tenements of the church

Are appendant or in gross.

Advowsons are either advowsons *appendant*, or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches,<sup>d</sup> the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant;<sup>e</sup> and it will pass, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words.<sup>f</sup> But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands.<sup>g</sup>

Presentative, Collative, or Donative.

Advowsons are also either *presentative*, *collative*, or *donative*.<sup>h</sup> An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson. An advowson collative is where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of collation, or conferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the King, or any subject by his license, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.<sup>i</sup> This is said to have been anciently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not

[ 23 ]

<sup>d</sup> Co. Litt. 119.

<sup>e</sup> *Ibid.* 121.

<sup>f</sup> *Ibid.* 307.

<sup>g</sup> Co. Litt. 120.

<sup>h</sup> *Ibid.*

<sup>i</sup> *Ibid.* 344.

being established more early than the time of archbishop Becket in the reign of Henry II.<sup>j</sup> And therefore though pope Alexander III.,<sup>k</sup> in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend, that the claim of bishops to institution is as old as the first planting of christianity in this island; and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the third, recorded by Matthew Paris,<sup>l</sup> which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is now become for ever presentative, and shall never be donative any more.<sup>m</sup> For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the standard of other ecclesiastical livings.

A material distinction between presentative and donative advowson is, that if the church become void in the lifetime of the patron, and remain so at the time of his

Where the patron waives his privilege.

[ 24 ]

Difference between presentative and donative presentations.

<sup>j</sup> Seld. Tith. c. 12, s. 2.

<sup>k</sup> *Decretal.* l. 3, t. 7, c. 3.

<sup>l</sup> A. D. 1239.

<sup>m</sup> Co. Litt. 344; Cro. Jac. 63.

death, then if the advowson be presentative, the right to present *pro hac vice* is in the executor; if donative in the heir: the advowson itself goes of course always to the heir.<sup>a</sup>

Prerogative presentation: what it is.

Recent act of Limitations as to Advowsons

It should also be remarked, that where an incumbent is made a bishop, the right of presentation is in the King, and is called a *prerogative* presentation. Until very recently there was no statute of limitations as to advowsons, but by the 3 & 4 W. 4, c. 27, some material alterations have been made with respect to their recovery. By s. 30 it is enacted that no advowson shall be recovered after three incumbencies, occupying a period of sixty years adverse possession; incumbencies after lapse are to be reckoned within the period, but not incumbencies after promotion to bishopricks (s. 31); and no advowson shall be recovered after 100 years adverse possession, although three incumbencies have not elapsed (s. 33.)

Tithes are Predial, Mixed, or Personal.

II. A second species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *predial*, as of corn, grass, hops, and wood;<sup>o</sup> the second *mixed*, as of wood, milk, pigs, &c.,<sup>p</sup> consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due.<sup>q</sup>

For what tithes are paid.

It is not to be expected from the nature of these general commentaries, that I should particularly specify what things are titheable, and what not, the time when, or the manner and proportion in which tithes are usually due. For this I must refer to such authors as have treated the matter in detail, and shall only observe, that, in general, tithes are to be paid for everything that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for anything that is of the substance of the earth,

<sup>a</sup> *Repington v. Governor of Tamworth*, 2 Wils. 150; and see 2 Black. Rep. 770.

<sup>o</sup> 1 Roll. Abr. 635; 2 Inst. 649.

<sup>p</sup> *Ibid.*

<sup>q</sup> 1 Roll. Abr. 656. See as to these, Burt. Comp. 434.



or is not of annual increase, as stone, lime, chalk, and the like, except by special custom ;<sup>r</sup> nor for creatures that are of a wild nature, or *feræ naturæ*, as deer, hawks, &c., whose increase so as to profit the owner is not annual, but casual.<sup>a</sup> It will rather be our business to consider, 1. The original of the right of tithes. 2. In whom that right [ 25 ] at present subsists ; and 3. Who may be discharged, either totally or in part, from paying them.

1. As to their original, I will not put the title of the clergy to tithes upon any divine right ; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino* ; whatever the particular mode of that maintenance may be. For besides the positive precepts of the New Testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy : ours in particular have established this of tithes, probably in imitation of the Jewish law ; and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of christianity among the Saxons, by Augustin the monk, about the end of the sixth century. But the first mention of them which I have met with in any written English law, is in a constitutional decree, made in a synod held A. D. 786,<sup>t</sup> wherein the payment of tithes in general is strongly

<sup>r</sup> Toll. 152, 153.<sup>a</sup> 2 Inst. 651.<sup>t</sup> Selden, c. 8, a. 2.

[ 26 ] enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators, and people. Which was a few years later than the time that Charlemagne established the payment of them in France," and made that famous division of them into four parts ; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy."

The next authentic mention of them is in the *fœdus Edwardi et Guthruni* ; or the laws agreed upon between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws :<sup>u</sup> wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion ; and, accordingly, we find<sup>x</sup> the payment of tithes not only *enjoined*, but a *penalty* added upon non-observance : which law is seconded by the laws of Athelstan,<sup>y</sup> about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. The persons to whom tithes are due.

2. We are next to consider the persons to whom they are due. And upon their first introduction (as hath formerly been observed<sup>z</sup>) though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased ;<sup>a</sup> which were called *arbitrary* consecrations of tithes : or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common.<sup>b</sup> But when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister ;

<sup>u</sup> A. D. 778.

<sup>v</sup> Rights of Persons, c. 11 ; Seld.

c. 6, s. 7 ; Sp. of Laws, b. 31, c. 12.

<sup>w</sup> Wilkins, p. 51.

<sup>x</sup> Cap. 6.

<sup>y</sup> Cap. 1.

<sup>z</sup> Rights of Persons, Introd. s. 4.

<sup>a</sup> 2 Inst. 646 ; Hob. 296.

<sup>b</sup> Seld. c. 9, s. 4.

first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land.<sup>c</sup>

However, arbitrary consecrations of tithes took place [ 27 ] again afterwards, and became in general use till the time of King John;<sup>d</sup> which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors, who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the Third,<sup>e</sup> about the year 1200 in a decretal epistle, sent to the Archbishop of Canterbury, and dated from the palace of Lateran; which has occasioned Sir Henry Hobart and others to mistake it for a decree of the council of Lateran, held A. D. 1179, which only prohibited what was called the 'infeodation of tithes, or their being granted to mere laymen,<sup>f</sup> whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries.<sup>g</sup> This epistle, says Sir Edward Coke,<sup>h</sup> bound

<sup>c</sup> LL. Edgar. c. 1 & 2; Canut. c. 11.

<sup>d</sup> Selden, c. 11.

<sup>f</sup> *Decretal.* l. 3, t. 30, c. 19.

<sup>e</sup> Opera Innocent. III. tom. 2, p.

<sup>g</sup> *Ibid.* c. 2, 6.

452.

<sup>h</sup> 2 Inst. 641.

[ 28 ] not the lay subjects of this realm ; but, being reasonable and just, (and, he might have added, being correspondent to the ancient law,) it was allowed of, and so became *lex terræ*. This put an effectual stop to all the arbitrary consecrations of tithes ; except some footsteps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another : for it is now universally held,<sup>1</sup> that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. The parson of the parish, we have elsewhere seen,<sup>1</sup> may be either the actual incumbent, or else the appropriator of the benefice : appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of tithes.<sup>k</sup>

In whom  
the right at  
present subsists.

3. Who may  
be discharged  
from paying  
tithes.

3. We observed that tithes are due to the parson of common right, unless by special exemption : let us therefore see, thirdly, who may be exempted from the payment of tithes, and how lands, and their occupiers, may be exempted or discharged from the payment of tithes, either in part or totally : first, by a real composition ; or secondly, by custom or prescription ; and, thirdly, by commutation.

1. By real  
composition.

First, a real composition is when an agreement is made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof.<sup>1</sup> This was permitted by law, because it was supposed that the clergy would be no losers by such composition ; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual : and hence have arisen all such compositions as exist at this day by

<sup>1</sup> Regist. 46 ; Hob. 296.

<sup>j</sup> See Rights of Persons, [384].

<sup>k</sup> In extra-parochial places the King, by his royal prerogative, has a right to

all the tithes. See Rights of Persons, p. [113].

<sup>1</sup> 2 Inst. 490 ; Regist. 38 ; 13 Rep. 40.

force of the common law. But, experience shewing that even this caution was ineffectual and the possessions of the church being, by this and other means, every day diminished, the disabling statute 13 Eliz. c. 10, was made: which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by consent of the patron or ordinary: which has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament. [ 29 ]

Secondly, a discharge by custom or prescription, is where time out of mind such persons or such lands have been either partially or totally discharged from the payment of tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom or prescription is either *de modo decimandi*, or *de non decimando*. 2. By custom or prescription.

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as twopence an acre for the tithe of land: sometimes, it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing. Modus decimandi.

To make a good and sufficient *modus*, the following rules must be observed. 1. It must be *certain* and *in-* [ 30 ] What is a good modus.

*variable*,<sup>m</sup> for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given, in lieu of tithes, must be beneficial to the *parson*, and not for the emolument of *third persons* only:<sup>n</sup> thus a *modus*, to repair the *church* in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson. 3. It must be something *different* from the thing compounded for:<sup>o</sup> one load of hay, in lieu of *all* tithe hay, is no good *modus*: for no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe: and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another.<sup>p</sup> Thus a *modus* of 1*d.* for every *milk* cow will discharge the tithe of *milk* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one, shall never be a discharge for the other. 5. The recompense must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain:<sup>q</sup> and therefore a *modus* that every *inhabitant* of a house shall pay 4*d.* a-year, in lieu of the owner's tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The *modus* must not be too large, which is called a *rank modus*; as if the real value of the tithes be 60*l. per annum*, and a *modus* is suggested of 40*l.*, this *modus* will not be established; though one of 40*s.* might have been valid.<sup>r</sup> And in these cases of pre-

[ 31 ] scriptive or customary moduses, the law supposes an original real composition to have been regularly made; which being lost by length of time, the immemorial usage is admitted as evidence to shew that it once did exist, and that from thence such usage was derived. Now time of memory was, until very recently, ascertained by the law to commence from the reign of Richard I.,<sup>s</sup> and any cus-

<sup>m</sup> 1 Keb. 602.<sup>n</sup> 1 Roll. Abr. 649.<sup>o</sup> 1 Lev. 179.<sup>p</sup> Cro. Eliz. 446; Salk. 657.<sup>q</sup> 2 P. Wms. 462.<sup>r</sup> 11 Mod. 60.<sup>s</sup> 2 Inst. 238. "This rule was adopted, says Blackstone, when by the stat. of

tom might have been destroyed by evidence of its non-existence in any part of the long period from that time to the present. Wherefore as this real composition is supposed to have been an equitable contract, or the full value of the tithes at the time of making it, if the modus set up was so rank and large as that it beyond dispute exceeded the value of the tithes in the time of Richard I., this modus was *felo de se*, and destroyed itself. For as it would be destroyed by any direct evidence to prove its non-existence at any time since that era; so also it is destroyed by carrying in itself this internal evidence of a much later original. However, as we shall see in the course of this chapter, the term of legal memory has been recently put within a much more reasonable limit.<sup>1</sup> And indeed, properly speaking, the doctrine of *rankness* in a *modus*, is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law.<sup>2</sup>

A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes.<sup>3</sup> So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesie*.<sup>4</sup> But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable.<sup>5</sup> And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet*.<sup>6</sup> But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally dis-

Prescription  
de non decimando.

[ 32 ]

Westm. 1. (3 Ed. 1. c. 39.) the reign of Richard 1. was made the time of limitation in a writ of right. But since, by the stat. 32 Hen. 8. c. 2. this period, (on a writ of right) hath been very rationally reduced to sixty years, it seems unaccountable that the date of legal prescription or memory should still continue to be reckoned from an era so very antiquated. See 2 Roll. Ab. 269. pl. 16." And we shall see that this suggestion

has been attended to. See 2 and 3 W. 4. c. 71. and *post*.

<sup>1</sup> See 2 and 3 W. 4. c. 71 and 100.

<sup>2</sup> *Pyke v. Dowling*, Hil. 19 G. 3, C. B. 2 Bl. R. 1257.

<sup>3</sup> Cro. Eliz. 511.

<sup>4</sup> Cro. Eliz. 479, 511; Sav. 3; Moor, 910.

<sup>5</sup> Cro. Eliz. 479.

<sup>6</sup> *Ibid.* 511.

charged of tithes, by various ways;\* as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes.\* Though upon the dissolution of abbeys by Henry VIII., most of these exemptions from tithes would have fallen with them, and the lands become titheable again: had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free: for, if a man can shew his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before mentioned, this is now a good prescription *de non decimando*. But he must show both these requisites: for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands.

Recent act as to claims of modus and exemption from tithes.

By the 2 & 3 W. IV. c. 100, certain alterations are made as to the time required in proving claims of *modus decimandi*, or exemption from, or discharge of tithes. By s. 1, it is enacted that all prescriptions and claims of any *modus*, or of any exemption or discharge of tithes by composition real or otherwise, shall be sustained and held valid, upon evidence shewing, in case of *modus*, the payment of such *modus*, and in cases of exemption, the enjoyment of the land without payment of tithes for the full period of *thirty* years next before the time of such demand, except under the special circumstances therein mentioned. And if such

\* Hob. 309; Cro. 08.

\* 2 Rep. 44; Seld. Tith. c. 13, s. 2.



proof in support of the claim shall be extended to the full period of *sixty* years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or tender of *modus* was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing. By s. 2, it is enacted, that every composition for tithes, made or confirmed by the decree of any Court of Equity in England, in a suit to which the ordinary, patron, and incumbent were parties, shall be valid; and that no *modus* or exemption shall be within the act, unless it shall be proved to have existed one year next before the passing of the act.<sup>b</sup>

Thirdly, by commutation. A third mode of exemption from payment of tithes in kind, which has already become the most common of any, is by commutation, and this has frequently been effected by acts of parliament, limited in their operation to particular places, but has recently been rendered general throughout the country, by virtue of the Tithe Commutation Act.<sup>c</sup> This important measure contemplates and provides for two modes of commutation, the one voluntary, the other compulsory; the latter came into operation on the 1st of October, 1838: the former has been adopted since the act was in force. Commissioners are appointed under the act, to carry its provisions into effect; the equivalent for tithes is to be a corn-rent charge, payable in money, according to the value of a fixed quantity of corn, as ascertained from year to year by the average price of corn for the seven years, ending at the preceding Christmas. Under this act very great progress has already been made, and we may reasonably hope that by its operation much of the intricate and difficult law relating to tithes will speedily become obsolete.

s. By commutation of tithes.

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as, to feed his beasts, to catch fish, to dig turf, to cut wood, or

<sup>b</sup> As to this statute, see *Salkeld v. Johnson*, 1 Hare, 196; *Clayton v. Meadows*, 2 Hare, 26.

<sup>c</sup> 6 & 7 Will. 4 c. 71, amended by the 1 Vict. c. 69, 1 & 2 Vict. c. 64, 2 & 3 Vict. c. 62, 3 Vict. c. 15, 5 & 6 Vict. c. 54.

Of four sorts. the Like.<sup>d</sup> And hence common is chiefly of four sorts ; common of pasture, of piscary, of turbary, and of estovers.

[ 33 ] 1. Common of pasture is a right of feeding one's beasts on another's land : for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor ; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.<sup>e</sup>

Appendant. Common *appendant* is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of most universal right : and it was originally permitted,<sup>f</sup> not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts ; these beasts could not be sustained without pasture ; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and other tenants. The law, therefore, annexed this right of common, as inseparably incident, to the grant of the lands ; and this was the original of common appendant : which obtains in Sweden, and the other northern kingdoms, much in the

Appurtenant same manner as in England.<sup>g</sup> Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity ; but may be annexed to lands in other lordships,<sup>h</sup> or extend to other beasts, besides such as are generally commonable ; as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, is therefore not of general right ; but can only be claimed by immemorial usage and prescription,<sup>i</sup> which the

<sup>d</sup> Finch, Law, 157.

<sup>e</sup> Co. Litt. 122.

<sup>f</sup> 2 Inst. 86.

<sup>g</sup> Stiernh. *de Jure Sueonum*, 1, 2,

c. 6.

<sup>h</sup> Cro. Car. 482 ; 1 Jon. 397.

<sup>i</sup> Co. Litt. 121, 122.

law esteems sufficient proof of a special grant or agreement for this purpose, or by modern special grant.<sup>k</sup> A right or benefit claimed by prescription, must strictly have been proved to have commenced from the time of legal memory or the reign of Rich. I. But this rule being obviously inconvenient, was not closely adhered to by the Courts, and proof of enjoyment as far back as living witnesses could speak, unless rebutted by other testimony, raised a presumption of an enjoyment from a remote era. By a recent act (2 & 3 W. IV., c. 71,) however, it is enacted that after *thirty* years enjoyment, claims to common and other profits *a prendre* shall not be defeated by showing that they were first enjoyed at any period prior to the thirty years, but such claims may be defeated in any other way by which the same were then liable to be defeated: and when such rights shall have been enjoyed for *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken by some agreement expressly made for that purpose by deed or writing (s. 1.) Common *because of vicinage*, or neighbourhood, is where the inhabitants of two townships which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape, and stray thither of themselves, the law winks at the trespass.<sup>l</sup> Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property,

Recent act as to claims to common.

Common because of vicinage.

Common in gross.

<sup>k</sup> *Cowlam v. Slack*, 15 East, 108.

<sup>l</sup> Co. Litt. 122.

and may be vested in one who has not a foot of ground in the manor.

Common  
without  
stint.

Enclosure of  
common.

All these species of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year.

By the statute of Merton, however, and other subsequent statutes,<sup>m</sup> the lord of a manor may enclose so much of the waste as he pleases, for tillage or wood ground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law "approving:" an ancient expression, signifying the same as "improving."<sup>n</sup> The lord hath the sole interest in the soil; but the interest of the lord and commoner in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage; but the statute of Merton only extends to common of pasture.<sup>o</sup> Commons are now very frequently inclosed under private or general inclosure acts. The general acts are the 41 Geo. III. c. 109, amended by the 1 & 2 G. IV. c. 23, and the 6 & 7 W. 4, c. 115, amended by the 3 & 4 Vict. c. 31.

2, 3. Common  
of piscary  
and turbary.

2, 3. Common of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground.<sup>p</sup> There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

[ 35 ]

4. Common  
of estovers.

4. Common of estovers or *estouviers*, that is, *necessaries*, (from *estoffer*, to furnish) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood, to repair, or

<sup>m</sup> 23 Hen. 3, c. 4; 29 G. 2, c. 36;  
31 G. 2, c. 41; and 10 G. 3, c. 42.

<sup>n</sup> 2 Inst. 474.

<sup>o</sup> 9 Rep. 113; Wils. 17; 6 T. R.  
741: 1 Tannt. 435.

<sup>p</sup> Co. Litt. 122.

to burn in the house; which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.<sup>1</sup>

These several species of commons do all originally result from the same necessity as common of pasture; viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A fourth species of incorporeal hereditaments is *v. ways*. that of *ways*; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company.<sup>2</sup> A way may be also by prescription; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground, for such a particular purpose: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act

[ 36 ]

<sup>1</sup> Co. Litt. 41.<sup>2</sup> Finch, Law. 31.

and operation of law : for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it, and I may cross his land for that purpose without trespass.\* For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same.† By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased : which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman.‡

Recent act  
as to claims  
of right of  
way.

By the 2 & 3 W. IV. c. 71, s. 2, it is enacted that no claim of right of way or to the use of water uninterruptedly enjoyed for *twenty* years, shall be defeated by shewing that such way, &c. was first enjoyed at any time prior to such period of twenty years : but such claim may be defeated in any other way by which the same was then liable to be defeated ; and where there shall have been an enjoyment for the period of *forty* years, the right shall be deemed absolute and indefeasible, unless it shall appear that there was some agreement expressly made for the purpose by deed or writing. But it has been held under this act that the claimant must shew that he has enjoyed the way for the full period of twenty years, down to the commencement of the action, and that he has done so of right, and without interruption, and that such claim may be answered by proof of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years.‡

Rights to  
water and  
watercourses.

*Rights to water and watercourses* may be conveniently classed under the head of ways. The well settled rule as to these is, that *primâ facie* the proprietor of each bank of a stream is the proprietor of half the land covered by

\* Finch, Law. 68.

† Co. Litt. 56.

‡ Ld. Raym. 725 ; 1 Brownl. 212 ; 2 Show. 28 ; 1 Jon. 297. But see *Taylor v. Whitehead*. Dougl. 745.

‡ *Bright v. Walker*, 1 Cr. M. &

Ros. 211 ; 4 Tyr. 502. *Monmouth Canal Company*, 1 Cr. M. & Ros. 614 ; 5 Tyr. 68. *Payne v. Shedden*, 1 Moo. & R. 382. *Parker v. Mitchell*, 11 Ad. & R. 788.

the stream; but there is no property in the water. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above; and every proprietor who claims a right either to throw the water back above, or to diminish it below, must either prove an actual license or grant from the other proprietors, or must prove an uninterrupted enjoyment of twenty years, which will afford presumption of a grant.\* The right to water usually refers to a stream passing through a man's own land,<sup>†</sup> the banks of which or one of which belongs to himself. But if the river be a public navigable river, the enjoyment or right upon it for a much longer period than twenty years will not raise a presumption of a grant.<sup>‡</sup>

V. Offices, which are a right to exercise a public or v. Offices. private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators.<sup>§</sup> Neither can any *judicial* office be granted in reversion; because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient; but *ministerial* offices may be so granted;<sup>¶</sup> for those may be executed by deputy. Also by statute 5 & 6 Edw. VI. c. 16, extended by the 49 G. III. c. 26, and 6 G. IV. cc. 82 & 83, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it.<sup>b</sup> For the

\* *Bealey v. Shaw*, 6 East, 215.  
*Cross v. Lewis*, 2 B. & C. 686. *Wright v. Howard*, 1 Sim. & Stu. 190. Hale de jure Maria. pl. 1, c. 1; 2 & 3 W. 4, c. 71, s. 2, stated p. 36.

† *Wright v. Williams*, 1 Tyr. & G. 398.

‡ *Vooght v. Winch*, 2 B. & A. 662.

*Rex v. Montague*, 4 B. & C. 603.

§ 9 Rep. 97.

¶ 11 Rep. 4.

<sup>b</sup> And see as to the assignment of offices. *Cooper v. Reilly*, 2 Sim. 560. *Alexander v. D. of Wellington*, 2 Russ. & M. 35. *Wells v. Foster*, 8 M. & W. 149.

law presumes that he, who buys an office, will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

VI. Dignities.

VI. Dignities bear a near relation to offices.<sup>c</sup> It will here be sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. Franchises.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is,<sup>d</sup> a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or, in some cases, may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man, or in many: but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant.<sup>e</sup>

Mention of several.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas; and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction; to have a bailiwick, or liberty exempt from the sheriff of the county; wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public

[ 38 ]

<sup>c</sup> See further as to Offices, Rights of Persons, Ch. 12.

<sup>d</sup> Finch, Law. 164.

<sup>e</sup> 2 Roll. Abr. 191; Keilw. 196.



places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement, (as in consideration of repairs, or the like), else the franchise is illegal and void;<sup>f</sup> or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

As to a *forest*: this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws.<sup>g</sup> But a *chase* differs from a park, in that it is not enclosed, and also in that a man may have a chase in another man's ground as well as in his own; being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an inclosed chase, extending only over a man's own grounds. The word *park*, indeed, properly signifies an enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so.<sup>h</sup> Though now the difference between a real park and such enclosed grounds, is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase,<sup>i</sup> except such as possess these franchises of forest, chase, or park. [ 39 ]

*Free-warren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren;<sup>k</sup> which, being *feræ naturæ*, every one had a natural right to kill as he could; but upon the introduction of the forest laws, at the Norman conquest, as will be shewn hereafter, these animals being looked upon

<sup>f</sup> 2 Inst. 220.

<sup>g</sup> 4 Inst. 314. But see Mannw. For. pl. 77.

<sup>h</sup> Co. Litt. 233; 2 Inst. 199; 11 Rep. 86.

<sup>i</sup> These are properly buck, doe, fox, martin, and roe; but in a common and legal sense extend likewise to all the beasts of the forest: which, besides the other, are reckoned to be

hart, hind, hare, boar, and wolf, and in a word, all wild beasts of venary or hunting. Co. Litt. 233.

<sup>k</sup> The beasts are hares, conies, and roes: the fowls are either *campêtres*, as partridges, rails, and quails; or *sylvêtres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons *Ibid.*

as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man, therefore, that has the franchise of warren, is in reality no more than a royal gamekeeper: but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren.<sup>1</sup> This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times, who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground.<sup>m</sup> A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed:<sup>n</sup> though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested.<sup>o</sup> This opening was extended, by the second<sup>p</sup> and third<sup>q</sup> charters of Hen. III., to those also that were fenced under Richard I.; so that a [ 40 ] franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several* fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil,<sup>r</sup> which in a free fishery is not requisite. It differs also from a *common* of piscary before mentioned, in that the free fishery is an exclusive right, the common of piscary is not

<sup>1</sup> Salk. 637.<sup>m</sup> Bro. Abr. tit. Warren, 3.<sup>n</sup> Seld. *Mar. Claus. I.* 24, Dufresne, V. 503. *Crag. de Jur. feud. II.* 8, 15.<sup>o</sup> Cap. 47, edit. Ozon.<sup>p</sup> Cap. 20.<sup>q</sup> 9 Hen. 3, c. 16.<sup>r</sup> M. 17 Edw. 4, 6; P. 18 Edw. 44; T. 10 Hen. 7. 24, 26; Salk. 637.

so: and therefore, in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards.\* Some, indeed, have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor.† But to consider such right as originally a flower of the prerogative, till restrained by *magna carta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect of this matter, with which our books are embarrassed. For it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law books; and that there are not wanting respectable authorities‡ which maintain, that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

By the 2 & 3 W. IV. c. 71, s. 1, it is enacted, that no claim which may be lawfully made at the common law by custom, prescription, or grant, to any profit or benefit to be taken and enjoyed from or upon any land of the King, shall, when such profit or benefit shall have been actually taken and enjoyed by any person, claiming right thereto without interruption for the full period of *thirty* years, be defeated or destroyed by shewing only that such profit or benefit was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless such claim may be defeated in any other way, by which the same was then liable to be defeated; and when such profit or benefit shall have been so taken and enjoyed as aforesaid, for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made for that purpose by deed or writing.

Limitation of  
claim as to  
franchises.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's main-

VIII. Corodics.

\* F. N. B. 88; Salk. 637.

† 2 Sid. 8.

‡ See them well digested in Hargrave's notes on Co. Litt. 122.

tenance. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added

IX. Annuities.

[ 41 ]

IX. Annuities, which are much of the same nature, only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor.\* Therefore, if a man by deed grant to another the sum of 20*l.* *per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the statutes of mortmain;† and yet a man may have a real estate in it, though his security is merely personal. By Stat. 4 Will. IV. c. 22, s. 2, all annuities made payable at fixed periods, under any instrument executed after the passing of this act, (16th of June, 1834,) shall be apportioned, so that on the death of the person entitled thereto a proportionate part of the annuity shall become payable to his representatives.‡

X. Rents, re-  
quiescentes of.

X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being the nature of an acknowledgment given for the possession of some corporeal inheritance.§ It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent.¶ It may also consist in

‡ Finch Law. 162.

\* Co. Litt. 144.

† *Ibid.* 2.

§ See *post* 44, and ch. 32.

¶ Co. Litt. 144.

¶ Co. Litt. 142.

services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year: but it may be reserved every second, third, or fourth year:<sup>b</sup> yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be a part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted.<sup>c</sup> It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. [ 42 ] Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like;<sup>d</sup> (although it may be out of tithes, with all properties of rent, except distress). But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt:<sup>e</sup> though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law<sup>f</sup> three manner of rents: rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporeal service incident to it, as at the least fealty or the feudal oath of fidelity.<sup>g</sup> For, if a tenant holds his lands by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents being connected with personal services, are therefore called rent service. And for these, in case they be behind, or arrear, at the day appointed, the lord may distrain of common right, without reserving any special

<sup>b</sup> Co. Litt. 47.<sup>c</sup> *Ibid.* 47.<sup>c</sup> Plowd. 13; 8 Rep. 71.<sup>f</sup> Litt. s. 213.<sup>d</sup> Co. Litt. 144; 3 Wils. 25; 2<sup>e</sup> Co. Litt. 142.

Saund. 303.

power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired.<sup>b</sup>

**Rent-charge.** A *rent-charge*, is where the owner of the rent hath no future interest, or reversion expectant in the land, but is entitled by force of an express contract to distrain; as where a man by deed maketh over to others his *whole* estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrear, or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a *rent-charge*, because in this manner the land is charged with

a distress for the payment of it.<sup>i</sup> **Rent-seck.** *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress. By stat. 4 W. IV. c. 22, s. 2, all rent-service reserved, or any lease by a tenant for life, or for any life interest, or by any lease granted under any power, which leases shall have been granted after the passing of the act, (16th June, 1834,) and all rent-charges, and other rents made payable at fixed periods, under any instrument executed after the passing of the act, shall be apportioned so that on the death of the person entitled thereto, a proportionate part of the rent shall become payable to his representatives. It has been held that this statute does not apply to rents payable by tenants from year to year, which have not been reserved by instruments in writing.<sup>k</sup>

**Other species of rents.**

There are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and ancient copyholders of a manor,<sup>l</sup> which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents, *reditus capitales*; and both sorts are indifferently denominated *quit* rents, *quieti reditus*; because thereby the tenant goes quit and free of all other services.

<sup>b</sup> Litt. s. 213, &c.

<sup>i</sup> Co. Litt. 143.

<sup>k</sup> In re *Markby*, 4 Myl. and C. 485, and see *Michell v. Michell*, 4 Bea. 549.

<sup>l</sup> 2 Inst. 19.

When these payments were reserved in silver or white money, they were anciently called *white-rents*, or *blanch-farms*, *reditus albi*;<sup>m</sup> in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri* or *black mail*.<sup>n</sup> *Rack-rent* is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent issuing out of an estate in fee; of at least one fourth of the value of the lands, at the time of its reservation;<sup>o</sup> for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple instead of the usual methods for life or years.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now abolished; and all persons may have the like remedy by distress for rents-seck, rents of assise, and chief-rents, as in case of rents reserved upon lease.<sup>p</sup>

Differences  
now abo-  
lished.

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation:<sup>q</sup> but, in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country.<sup>r</sup> And, strictly, the rent is demandable and payable before the time of sun-set of the day whereon it is reserved;<sup>s</sup> though perhaps not absolutely due till midnight.<sup>t</sup> By stat. 3 & 4 W. IV. c. 27, s. 42, no arrears of rent shall be recovered by distress or suit, but within *six* years after the same shall have become due; but by stat. 3 & 4 W. IV. c. 42, s. 3, all actions of debts for rent, on an indenture of demise, must be commenced within *ten* years after the end of that session, or twenty years after the cause of action. On these apparently conflicting enactments, it has been held, that as to an action for rent, on an indenture of demise, the latter act (having last received the royal assent) must prevail.<sup>u</sup>

Where rent  
is payable.

<sup>m</sup> In Scotland this kind of small payment is called *blanch-holding*, or *reditus albe firmæ*. See *Bradbury v. Wright*, Dougl. 604, note 1, as to the definition of a fee-farm rent.

<sup>n</sup> 2 Inst. 19. <sup>o</sup> Co. Litt. 143 b.

<sup>p</sup> Stat. 4 G. 2, c. 28.

<sup>q</sup> Co. Litt. 201. <sup>r</sup> 4 Rep. 73.

<sup>s</sup> Co. Litt. 302; 1 Anders. 253.

<sup>t</sup> 1 Saund. 287; Prec. Chan. 555; Salk. 578.

<sup>u</sup> *Paget v. Foley*, 2 Bing. N. C. 679. For the Doctrine relating to the Original of Rents and Distresses for Rent, see the next Chapter and Private Wrongs, Chap. I.

*Feoda Fee. A conditional stipend or reward*

## CHAPTER THE FOURTH.

[ 44 ]

### OF THE FEUDAL SYSTEM.

A general acquaintance with the nature and doctrine of feuds, or the feudal law, necessary.

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law : a system so universally received throughout Europe, upwards of twelve centuries ago, that Sir Henry Spelman<sup>a</sup> does not scruple to call it the law of nations in our western world. This Chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected ; and that it is impracticable to comprehend many rules of the modern law, in a scholar-like scientific manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use : as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices in their pristine proportion and splendour.

[ 45 ]

I to origin.

*Feoda :*

The constitution of feuds<sup>b</sup> had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*,

<sup>a</sup> Of Parliaments, 57

<sup>b</sup> See Spelman of feuds, and Wright of tenures, *per tot.*



as Crag very justly entitles it,<sup>c</sup> poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and to that end large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers.<sup>d</sup> These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the northern languages<sup>e</sup> signifies a conditional stipend or reward.<sup>f</sup> Rewards or stipends they evidently were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty:<sup>g</sup> and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.<sup>h</sup>

Allotments, thus acquired, naturally engaged such as accepted them to defend them; and as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each others' possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called

[ 46 ]

<sup>c</sup> *De jure feud.* 19, 20.

<sup>d</sup> Wright, 7.

<sup>e</sup> Spelm. *Gl.* 216.

<sup>f</sup> Pontoppidan, in his history of Norway (p. 290) observes, that in the northern languages *odh* signifies *proprietas*, and *all totum*. Hence he derives the *odhal* right in those countries; and thence too, perhaps, is derived the *udal* right in Finland, &c. (See Mac Doual. *Inst.* part 2.) Now the transposition of these northern syl-

lables, *allodh*, will give us the true etymology of the *allodium*, or absolute property of the feudists; as by a similar combination of the latter syllable with the word *fee* (which signifies, we have seen, a conditional reward or stipend) *fezodh* or *feodum* will denote stipendiary property.

<sup>g</sup> See this oath explained at large in *Feud. l.* 2, t. 7.

<sup>h</sup> *Feud. l.* 2, t. 24.

upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself; and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country;<sup>1</sup> the prudence of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.<sup>k</sup>

The universality and early use of this feudal plan, among all those nations, which in complaisance to the Romans we still call barbarous, may appear from what is recorded<sup>1</sup> of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the christian era. They demanded of the Romans, "*ut martius populus aliquid sibi terræ daret, quasi stipendium: cæterum, ut vellet, manibus atque armis suis uteretur.*" The sense of which may be thus rendered; they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lords should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards: when the Salii, Burgundians, and Franks broke in upon Gaul; the Visigoths on Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had

<sup>1</sup> Wright, 8.

<sup>k</sup> Other writers have considered that the system of feuds was not so much adopted with a view to security from foreign invasion or domestic insurrection, as a conventional arrangement of property, established for the purpose of

aggrandizing certain lords, and of protecting persons of inferior rank from the inconvenience of civil disorder. Rob. Charles V., vol. i., n. 81; Hall. Mid. Ages, vol. i., p. 142.

<sup>1</sup> *L. Florus*, l. 3, c. 3.

newly gained. And from hence too it is probable that the Emperor Alexander Severus<sup>m</sup> took the hint, of dividing lands conquered from the enemy among his generals and victorious soldiery, duly stocked with cattle and bondmen, on condition of receiving military service from them and their heirs for ever.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all of them, thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial*, (that is, wholly independent, and held of no superior at all,) now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty.<sup>n</sup> And thus, *its progress*. in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit*.<sup>o</sup>

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till

[ 48 ]  
The period of  
its reception  
in this coun-  
try.

<sup>m</sup> "Sola, quæ de hostibus capta sunt, limilaneis ducibus et militibus donavit; ita ut eorum ita essent, si hæredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos, si etiam sua rura defenderent. Addidit sane his et animalia et servos, ut possent colere quod accepe-

rant; ne per inopiam hominum vel per senectutem desererentur rura vicina barbaria quod turpissimum ille ducebat." (Æl. Lamprid. in vita Alex. Severi.)

<sup>n</sup> Wright. 10.—See post, chap. 8.

<sup>o</sup> Grav. Orig. l. 1, s. 139.

the reign of William the Norman.<sup>p</sup> Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use: yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, or even later,<sup>q</sup> that feuds arrived at their full vigour and maturity, even on the continent of Europe.<sup>r</sup>

Its gradual  
establishment by the  
Normans.

This introduction, however, of the feudal tenures into England, by king William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word *conquest*; which, in its feudal acceptation, signifies no more than *acquisition*: and this has led many hasty writers into a strange historical mistake, and one which upon the slightest examination will be found to be most untrue. However, certain it is, that the Normans now began to gain very large possessions in England; and their regard for the feudal law, under which they had long lived, together with the king's recommendation of this policy to the

Signification  
of the word  
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<sup>p</sup> Spelm. *Gloss.* 218. Bract. l. 2, c. 16, s. 7.

<sup>q</sup> Dr. Hallam considers that the feudal system did not attain full ma-

turity in England until the eleventh or twelfth century. Hall. Mid. A. v. 1, p. 192.

<sup>r</sup> Crag. l. 1, t. 4.

English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle,\* that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless: which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation; the immediate consequence of which was, the compiling of the great survey called Domesday Book, which was finished in the next year: and in the latter end of that very year, the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person." This may possibly have been the era of formally introducing the feudal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant,<sup>†</sup> and concluded in these remarkable words: [ 50 ]

The compilation of Domesday-book, and the submission of the principal landholders to military tenure.

\* A. D. 1085.

† *Rez tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra: quo modo incoleretur, et a quibus hominibus.* Chron. Sax. *ibid.*

" *Omnes prædia tenentes, quotquot*

*essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasallī, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.* Chron. Sax. A. D. 1086.

<sup>x</sup> Cap. 52. Wilk. 228.

The nature of  
the oath of  
fealty.

"*statuimus, ut omnes, liberi homines foedere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt: terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as Sir Martin Wright has observed)<sup>7</sup> are plainly feudal; for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vassal: and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies, foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection,<sup>8</sup> which exacts the performance of the military feudal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de foedis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.*"

The national  
and free  
adoption of  
the feudal  
system by  
the general  
assembly of  
the realm.

This new polity therefore seems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vassals of the crown.<sup>8</sup> The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually, by the consent of

[ 51 ]

<sup>7</sup> Tenures, 66.

<sup>8</sup> Cap. 58. Wilk. 228.

<sup>a</sup> Montesq. Sp. L. b. 31, c. 8. But see Hall. Mid. A. ch. 2, p. 1.

private persons; the latter was done at once, all over England, by the common consent of the nation.<sup>b</sup>

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom," and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services." For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, as if they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding: and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations;<sup>d</sup> as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

Consequences of its adoption.

Grievances which its introduction into England occasioned.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with [ 52 ] reason looked upon these deductions as grievous imposi-

<sup>b</sup> Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the

fifth part of their value. (Gen. ch. xlvii.)

<sup>c</sup> *Tout fut en luy, et vient de luy al commencement.* (M. 24 Edw. 3. 65.)

<sup>d</sup> Splem. of Feuds, c. 28.

caused the  
insurrection  
of the ba-  
rons, which  
produced  
*Magna  
Charta.*

tions, and arbitrary conclusions from principles that, as to them, had no foundation in truth.<sup>e</sup> However, this king, and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines; but their successor, Henry I., found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter,<sup>f</sup> whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him: which at length produced the famous great charter at Runingmead, which, with some alterations, was confirmed by his son Henry III. And though its immunities (especially as altered on its last edition by his son<sup>g</sup>) are very greatly short of those granted by Henry I. it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will shew, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

[ 53 ]  
Nature of  
feuds.

Having given this short history of their rise and progress, we will next consider the nature, doctrine, and

<sup>e</sup> Wright, 81.

<sup>g</sup> 9 Hen. 3.

<sup>f</sup> LL. Hen. Hen. 1, c. 1.



principal laws of feuds ; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures, as were either abolished in the last century, or still remain in force.

The grand and fundamental maxim of all feudal tenure is this ; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor or *lord* ; being he who retained the dominion or ultimate property of the feud or fee : and the grantee, who had only the use and possession, according to the terms of the grant, was stiled the feudatory or *vassal*, which was only another name for the tenant or holder of the lands ; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards granted on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi* : which are still the operative words in our modern infeudations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals ; which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known : and therefore the evidence of property was reposed in the memory of the neighbourhood ; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord ; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sate before him ; and there professing that “ he did become his *man*, from that day forth, of life and limb, and earthly honour : ” and then he received a kiss from his lord.<sup>h</sup> Which ceremony was deno-

Fundamental maxim of feudal tenure, what.

Grantor called lord ;

Grantee vassal.

Mode of grant—

corporal investiture,

Oath of fealty.

Homage,

[ 54 ]

<sup>h</sup> Litt. s. 85.

minated *homagium* or *manhood*, by the feudists, from the stated form of words, *devenio vester homo*.<sup>1</sup>

Services due  
to the lord—

in peace,

[ 55 ]

in war.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold; to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies, or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts *baron*,<sup>1</sup> (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants,) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feudal institutions, both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiae*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

<sup>1</sup> It was an observation of Dr. Arbuthnot, that tradition was no where preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134. 8vo.) It will not, I hope, be thought

puerile to remark, (in confirmation of this observation,) that in one of our ancient juvenile pastimes (the *king I am*, or *basilinda* of Julius Pollux, *Onomastic* l. 9, c. 7,) the ceremonies and language of feudal homage are preserved with great exactness.

<sup>1</sup> *Feud.* 1. 2, t. 55.

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord,<sup>k</sup> who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year: an annual distribution of lands being made by their leaders in their general councils or assemblies.<sup>l</sup> This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should inroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory.<sup>m</sup> But still feuds were not yet *hereditary*; though frequently granted, by the favour of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard to reject the heir, if he were capable to perform the services:<sup>n</sup> and therefore infants, women and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance, or in the

Feuds were at first held at the will of the lord;

afterwards, for one or more years;

then for life;

who, incapable of succeeding to a feud.

[ 56 ]

Relief, what.

<sup>k</sup> Feud. l. 1, t. 1.

<sup>l</sup> Thus Tacitus: (*de Mor. Germ. c. 26*) "*agri ab universis per vices occupantur: arva per annos mutant.*" And Cæsar yet more fully, (*de Bell. Gall. l. 6, c. 21.*) "*Neque quisquam agri modum certum, aut fines proprios habet;*

*sed magistratus et principes, in annos singulos, gentibus cognationibusque hominum qui una coierint, quantum et quo loco visum est, attribuant agri, atque anno post alio transire cogunt.*"

<sup>m</sup> Feud. l. 1, t. 1.

<sup>n</sup> Wright, 14.

words of the feudal writers, "*incertam et caducam hereditatem relevabat.*" This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

In process of time feuds became descendible to the sons of the feudatory.

For in process of time feuds came by degrees to be universally extended, beyond the life of the first vassal, to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions: and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation.<sup>o</sup> But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants in *infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory."<sup>p</sup> And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found upon many accounts inconvenient, (particularly, by dividing the services, and thereby weakening the strength of the feudal union,) and *honorary* feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son;<sup>q</sup> in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.<sup>r</sup>

[ 57 ]

<sup>o</sup> Wright, 17.

<sup>p</sup> *Ibid.* 182.

<sup>q</sup> *Feud*, 2, t. 55.

<sup>r</sup> Wright, 32.

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud: neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord.\* For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself or from his posterity, who were presumed to inherit his valour, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord;† it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

The feudatory could not dispose of his feud without the consent of the lord.

Neither could the lord transfer his seignory without the consent of the vassal.

These were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents. And by these means the feudal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "re-re-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords.‡ But this at the same time demolished [ 58 ] the ancient simplicity of feuds: and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made

Vassals had, in like manner, their inferior tenants bound to them by the like obligations.

inferior feudatories

Change in the nature of feuds.

\* Wright, 29.

† Ibid. 50.

‡ Ibid. 20.

from the old fundamental rules of tenure and succession ; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds ; under the former of which divisions were comprehended such, and such only, of which we have before spoken ; and under that of improper or derivative feuds were comprised all such as do not fall within the other description : such, for instance, as were originally bartered and sold to the feudatory for a price ; such as were held upon base or less honourable services, or upon a rent, in lieu of military service ; such as were in themselves alienable, without mutual license ; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine, and proper feud.

Oppressive  
consequences  
drawn from  
the feudal  
system.

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject : in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised : what effect it has produced on the landed property of England will appear in the following chapters.

† *Feud.* 2, t. 7. Wright, 36.

## CHAPTER THE FIFTH.

## OF THE ANCIENT ENGLISH TENURES.

[ 59 ]

IN this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements and hereditaments might have been holden; as the same stood in force, till the middle of the seventeenth century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles and no other; being fruits of, and deduced from, the feudal policy.

Of the ancient English tenures.

Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore stiled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is stiled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle lords. So that if the king granted a manor to *A.*, and he granted a portion of the land to *B.*, now *B.* was said to hold of *A.*, and *A.* of the king; or in other words, *B.* held his lands immediately of *A.*, but mediately of the king. The king therefore was stiled lord paramount; *A.* was both tenant and lord, or was a *mesne* lord: and *B.* was called tenant

All lands supposed to be holden of some superior lord.

The king, lord paramount;

a his grantees, mesne lands.

Tenants paravall.

*paravail*, or the lowest tenant: being he who was supposed to make avail, or profit, of the land.<sup>a</sup> In this manner are all the lands of the kingdom holden, which are in the hands of subjects; for according to Sir Edward Coke,<sup>b</sup> in the law of England we have not properly *allodium*; which, we have seen,<sup>c</sup> is the name by which the feudists abroad distinguish such estates of the subject as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

The king's immediate tenants called tenants *in capite*.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did.<sup>d</sup> This distinction ran through all the different sorts of tenure; of which I now proceed to give an account.

I. The principal species of lay tenures were four,

free, or

[ 61 ]

base;

certain, or

I. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services: in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier, or a freeman to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were only fit for peasants, or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be ex-

<sup>a</sup> 2 Inst. 206.

<sup>b</sup> 1 Inst. 1.

<sup>c</sup> Page 49.

<sup>d</sup> In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c. which

hold directly from the emperor, are called the *immediate* states of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hist. xliii. 61.



ceeded on any pretence ; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* uncertain. depended upon unknown contingencies : as, to do military service in person, or pay an assessment in lieu of it, when called upon ; or to wind a horn whenever the Scots invaded the realm ; which are free services : or to do whatever the lord should command ; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the seventeenth century ; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author, ancient or modern ;<sup>e</sup> of which the following is the outline or abstract.<sup>f</sup> “ Tenements are of two kinds, *frank-tenement*, and *villanage*. And, of frank-tenements, some are held freely in consideration of homage and *knight-service* ; others in *free-socage*, with the service of fealty only.” And again,<sup>g</sup> “ of villanages some are pure, and others privileged. He that holds in *pure villanage* shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villanage is called *villein-socage* ; and these villein-socmen do villein services, but such as are certain and determined.” Of which the sense seems to be as follows : first, where the service was *free*, but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry, *per servitum militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, &c., that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements ; the others were *villanous* or servile : as, thirdly, where the service was *base* in its nature, and

Bracton's account of tenures.

Tenure by knight-service.

[ 62 ]  
Free socage.

Absolute villanage.

<sup>e</sup> L 4, tr. 1, c. 28.

<sup>f</sup> Tenementorum aliud liberum, aliud villanagium. Item, liberorum, aliud tenetur libere pro homagio et servitio militari ; aliud in libero socagio cum fidelitate tantum, s. 1.

<sup>g</sup> Villanagiorum aliud purum, aliud

privilegiatum. Qui tenet in puro villanagio faciet quicquid ei preceptum fuerit, et semper tenebitur ad incerta. Aliud genus villanagii dicitur villanum socagium ; et hujusmodi villani socmanni—villani faciunt servitia, sed certa et determinata, s. 5.

Privileged  
villanage, or  
villein-soc-  
age.

uncertain as to time and quantity, the tenure was *purum villanagium*, absolute or pure villanage. Lastly, where the service was *base* in its nature, but reduced to a *certainty*, this was still villanage, but distinguished from the other by the name of privileged villanage, *villanagium privilegiatum*; or it might be still called socage (from the *certainty* of its services) but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

I. The first  
species of te-  
nure was by  
knight-ser-  
vice.

I. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare*, and in law-French, *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans,<sup>b</sup> which name is expressly given it by the *Mirrou*.<sup>1</sup> This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the genuine effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*, the measure of which in 3 Edw. I. was estimated at twelve ploughlands,<sup>2</sup> and its value (though it varied with the times,<sup>1</sup> in the reign of Edward I. and Edward II.)<sup>m</sup> was stated at 20*l. per annum*. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon:<sup>n</sup> which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion.<sup>o</sup> And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

Quantity and  
value of land  
necessary to  
constitute it.

Duties it im-  
posed on the  
tenant.

[ 63 ]

<sup>b</sup> Spelm. *Gloss.* 219.

<sup>1</sup> c. 2, s. 27.

<sup>2</sup> Pasch. 3 Edw. 1, Co. Litt. 69.

<sup>1</sup> 2 Inst. 596.

<sup>m</sup> Stat. Westm. 1, c. 36; Stat. de

*milit.* 1 Edw. 2, Co. Litt. 69.

<sup>n</sup> See writs for this purpose in *Memorand. Scacch.* 36, prefixed to Maynard's year-book, Edw. 2.

<sup>o</sup> Litt. s. 95.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi*;<sup>p</sup> was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin: and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz. aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavour to explain, and shew to be of feudal original.

Nature and form of grant.

Consequences incident to this species of tenure.

I. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress;<sup>q</sup> but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigour of the feudal law an absolute forfeiture of his estate.<sup>r</sup> Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms:<sup>s</sup> the intention of it being to breed up the eldest son and heir apparent of the signory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms: nor, by the nature of their tenure, could they charge their land with this, or any other incumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of

1. Aids, benevolences granted by the tenant to the lord—

To ransom the lord's person;

To make his eldest son a knight:

To marry his eldest daughter.

To which even the monasteries contributed.

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<sup>p</sup> Co. Litt. 9.

<sup>q</sup> *Auxilia fiunt de gratia et non de jure,—cum dependant ex gratia tenentium et non ad voluntatem domi-*

*norum.* Bracton, l. 2, tr. 1, c. 16, s. 8.

<sup>r</sup> Feud. l. 2, t. 24.

<sup>s</sup> 2 Inst. 233.

their founder's male heir (of whom their lands were holden) and the marriage of his female descendants.<sup>a</sup> And one cannot but observe, in this particular, the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; viz. to marry the patron's daughter; to pay his debts: and to redeem his person from captivity.<sup>1</sup>

Besides these, the lords exacted other aids;

But these actions were restricted by *magna charta*.

And by 25 Edw. I.

[ 65 ]

And completely ascertained by the stat. Westm. I.

But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts, (probably in imitation of the Romans,) and aids to enable him to pay aids or reliefs to his superior lord; for which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, king John's *magna charta*<sup>2</sup> ordained, that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edw. I., when the statute called *confirmatio chartarum* was enacted; which in this respect revived king John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable;<sup>3</sup> and that the aids taken by the king of his tenants *in capite* should be settled by parliament.<sup>4</sup> But they were never completely ascertained and adjusted till the statute Westm. I. 3 Edw. I., c. 36, which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee,

<sup>a</sup> Phillips's Life of Pole, I., 223.

<sup>1</sup> *Erat autem haec inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab*

*hostibus in bello captos redimerent.*  
Paul Manutius de senatu Romano, c. 1.

<sup>2</sup> cap. 12, 15.

<sup>3</sup> cap. 15.

<sup>4</sup> *Ibid.* 14.

for making the eldest son a knight, or marrying the eldest daughter; and the same was done with regard to the king's tenants *in capite* by statute 25 Edw. III., c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

And 25 Edw. III., c. 11.

2. Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But, though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were, therefore, looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir.<sup>7</sup> The English ill brooked this consequence of their new adopted policy; and therefore William the Conqueror by his laws<sup>8</sup> ascertained the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls, barons, and vavasours respectively; and, if the latter had no arms, they should pay 100s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws: thereby in effect obliging every heir to new-purchase or *redeem* his land:<sup>a</sup> but his brother, Henry I., by the charter before-mentioned, restored his father's law; and ordained that the relief to be paid [ 66 ] should be according to the law so established, and not an arbitrary redemption.<sup>b</sup> But afterwards, when by an ordinance in 27 Hen. II., called the assise of arms, it was provided that every man's armour should descend to his heir, for defence of the realm: and it thereby became impracticable to pay these acknowledgments in arms, according to the laws of the conqueror, the composition was universally accepted of 100s. for every knight's fee;

2. Relief.—  
Fines payable to the lord on taking up the estate at the death of the last tenant.

Assize of arms.

Composition in lieu of knight's fee,

<sup>7</sup> Wright, 99.

<sup>8</sup> C. 22, 23, 24.

<sup>a</sup> 2 Roll. Abr. 514.

<sup>b</sup> " *Haeres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eum.*" (Text. Roffens. cap. 34.)

payable only if the heir had attained twenty-one.

3. *Primer seisin*.—The right of the king, on the death of a tenant in *capite* seized of a knight's fee, to take certain profits.

as we find it ever after established.<sup>c</sup> But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one-and-twenty years.

3. *Primer seisin* was a feudal burthen, only incident to the king's tenants in *capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants in *capite* died seized of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life.<sup>d</sup> This seems to be little more than an additional relief, but grounded upon this feudal reason that, by the ancient law of feuds, immediately upon the death of a vassal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture; during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and day, it was by the strict law a forfeiture.<sup>e</sup> This practice, however, seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures in *capite*, the *prima seisin* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords.<sup>f</sup> The king was entitled to enter and receive the whole profits of the land, till livery [ 67 ] was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land.<sup>g</sup> And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiæ*, or first fruits.

<sup>c</sup> Glanv. l. 9, c. 4; Litt. s. 112.

<sup>d</sup> Co. Litt. 77.

<sup>e</sup> Feud. l. 2, t. 24.

<sup>f</sup> Stat. Marlbr. c. 16; 17 Edw. II.

c. 3.

<sup>g</sup> Staundf. Prerog. 12.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female,<sup>b</sup> the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and fourteen<sup>c</sup> in females. For the law supposed the heir male unable to perform knight-service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might, if she remained unmarried, keep her so till sixteen, by virtue of the statute of Westmin. 1, 3 Edw. I., c. 22, the two additional years being given by the legislature for no other reason but merely to benefit the lord.<sup>k</sup>

4. *Wardship.*—The right of the lord to have the custody or wardship of the heir till twenty-one in males, and sixteen in females,

the heir-male being under twenty-one, and the female under fourteen, at the death of the ancestor.

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person to supply the infant's services, till he should be of age to perform them himself. And, if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I., before-mentioned,

Wardship not a part of the law of feuds so long as they were arbitrary or temporary.

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<sup>b</sup> Litt. s. 103.

<sup>c</sup> Litt. s. 103. 2 Inst. 204. Mr. J. Coleridge's note.

<sup>k</sup> Litt. s. 103.

which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

Wardship of the body consequent on the wardship of the land.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

Liberty of *oustrelmain*.

Fines payable thereon.

When the male heir arrived to the age of twenty-one, or the heir-female to that of sixteen, they might sue out their livery or *oustrelmain*;¹ that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *magna carta*.² However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins.³ In order to ascertain the profits that arose to the crown by these first-fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county,⁴ commonly called an *inquisitio post mortem*; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon:—a manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empsom and Dudley, the wicked engines of Henry VII., that by colour of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto.⁵ And, afterwards, a court of wards and liveries was erected,⁶ for

¹ Co. Litt. 77.

² 9 Hen. III. c. 6.

³ Co. Litt. 77.

⁴ Hoveden. *sub* Ric. I.

⁵ 4 Inst. 198.

⁶ Stat. 32 Hen. VIII. c. 46.



conducting the same inquiries in a more solemn and legal manner.

When the heir thus came of full age, (provided, according to Blackstone, he held a knight's fee *in capite* under the crown, although in the opinion of others the right was not limited to them,\*) he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those heroic times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony, as was elsewhere hinted,† is supposed to have been the original of the feudal knighthood.‡ This prerogative, of compelling the vassals to be knighted, or to pay a fine, was expressly recognized in parliament, by the statute *de militibus*, 1 Edw. II.; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI. and queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I., among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

On the heir's attaining twenty-one, he was compelled to receive knighthood, or pay a fine to the king.

This prerogative was recognized by the statute 1 Edw. II.;

but was abolished by 16 Car. I., c. 20.

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5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matri-monium*) which, in its feudal sense, signifies the power, which the lord or guardian in chivalry had of disposing of

5. *Marriages.* —The right of the lord to dispose of his infant ward in marriage.

\* 2 Inst. 293. Mr. Christian's note.

† Rights of Persons, p. [404.]

‡ "In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto

*frameaque juvenem ornant. Haec apud illos toga, hic primus juvenis honos: ante hoc domus pars videntur; mox reipublicæ." De Mor. Germ. cap. 13.*

Fine on refusal of ward;

or on marriage without consent of the lord.

[ 71 ]

his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement*, or inequality : which if the infant, if a male, refused, he forfeited the value of the marriage, *valorem maritagii*, to his guardian ;<sup>u</sup> that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance ;<sup>v</sup> and, if the infant married himself without the guardian's consent, he forfeited double the value, *duplicem valorem maritagii* ;<sup>x</sup> but if the ward were a female, she could not refuse without entitling the lord to hold her lands by way of penalty till she attained the age of twenty-one, and even without tender of a match he was entitled, in every case, on the ward's coming of age, to the single value which he might have obtained for the marriage.<sup>y</sup> This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *controul* of the ward's marriage, especially of his female ward ; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy ;<sup>z</sup> but no tolerable pretence could be assigned why the lord should have the *sale*, or *value* of the marriage. Nor indeed is this claim of strictly feudal original ; the most probable account of it seeming to be this : that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards ;<sup>a</sup> which was introduced into England, together with the rest of the Norman doctrine of feuds : and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the First, he engages for the future to take nothing for *his* consent ; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great char-

<sup>u</sup> Litt. s. 110.

<sup>v</sup> Stat. Mert. c. 6 ; Co. Litt. 82.

<sup>x</sup> Litt. s. 110.

<sup>y</sup> Lord Darcy's case, 6 Rep. 706 ;

Palmer's case, 5 Rep. 126 b ; Co. Litt. 82.

<sup>z</sup> Bract. l. 2, c. 37, s. 6.

<sup>a</sup> Gr. Cust. 95.

ter, that heirs should be married without disparagement, the next of kin having previous notice of the contract;<sup>b</sup> or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua.*<sup>c</sup> But these provisions in behalf of the relations were omitted in the charter of Henry III.; wherein<sup>d</sup> the clause stands merely thus: "*haeredes maritentur absque disparagatione*:" meaning certainly, by *haeredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage<sup>e</sup> of heirs male; and as Glanvil<sup>f</sup> expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive foemina*, as Bracton more than once expresses it;<sup>g</sup> and also, as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could.<sup>h</sup> And afterwards this right, of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton;<sup>i</sup> which is the first direct mention of it that I have met with, in our own or any other law.

formerly confined to females,

but afterwards claimed also for males;

Right recognized by the statute of Merton.

6. Another attendant or consequence of tenure by knight-service was that of *fin*es due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection: it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and as the feudal obligations were considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer.

6. *Fines*.—Sums due to the lord on alienation by the tenant.

[ 72 ]

<sup>b</sup> Cap. 6, edit. Oxon.

<sup>c</sup> Cap. 3, *Ibid*.

<sup>d</sup> Cap. 6.

<sup>e</sup> The words *maritare* and *maritium* seem, *ex vi termini*, to denote the providing of a husband.

<sup>f</sup> L. 9, c. 9 and 12, and l. 9, c. 4.

<sup>g</sup> L. 2, c. 38, s. 1.

<sup>h</sup> Wright, 97.

<sup>i</sup> 20 Hen. II. c. 6.

For, when every thing came in process of time to be bought and sold, the lords would not grant a licence to their tenant to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but, as to common persons, they were at liberty, by *magna carta*,<sup>k</sup> and the statute of *quia emptores*,<sup>l</sup> (if not earlier,) to aliene the whole of their estate, to be holden of the same lord, as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a licence: for if they did, it was in ancient strictness an absolute forfeiture of the land;<sup>m</sup> though some have imagined otherwise. But this severity was mitigated by the statute 1 Edward III., c. 12, which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a licence of alienation; but, if the tenant presumed to aliene without a licence, a full year's value should be paid.<sup>n</sup>

#### 7. Escheats.

—The reversion of the fee to the lord, on the extinction or corruption of the blood of the tenant.

7. The last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back, to the lord of the fee;<sup>o</sup> that is, the tenure was determined by breach of the original condition, expressed or implied in the feudal donation. In the one case, there were no heirs subsisting

<sup>k</sup> Cap. 32.

<sup>l</sup> 18 Edw. I. c. 1.

<sup>m</sup> 2 Inst. 66.

<sup>n</sup> *Ibid.* 67.

<sup>o</sup> Co. Litt. 13.

of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended : in the other the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject ; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it.<sup>p</sup>

These were the principal qualities, fruits, and consequences of the tenure by knight-service : a tenure by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century ; and which was created, as Sir Edward Coke expressly testifies,<sup>q</sup> for a military purpose ; viz. for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper ; which was to attend the king in his wars. There were also some other species of knight-service ; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty*, *per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person ; as to carry his banner, his sword, or the like ; or to be his butler, champion, or other officer, at his coronation.<sup>r</sup> It was in most other respects like knight-service ;<sup>s</sup> only he was not bound to pay aid,<sup>t</sup> or escuage ;<sup>u</sup> and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little.<sup>w</sup> Tenure by *cornage*, which was, to wind a horn when the Scots or other enemies entered the land, in order to warn the king's

Tenure by knight-service, created for a military purpose.

Nature of tenure by grand serjeanty.

Difference between tenures by knight-service, and by grand serjeanty.

[ 74 ]

<sup>p</sup> *Feud.* l. 2, t. 86.

<sup>q</sup> 4 *Inst.* 192.

<sup>r</sup> *Litt.* s. 153.

<sup>s</sup> *Ibid.* s. 158.

<sup>t</sup> 2 *Inst.* 233.

<sup>u</sup> *Litt.* s. 158.

<sup>w</sup> *Ibid.* 154.

subjects, was (like other services of the same nature) a species of grand serjeanty.<sup>2</sup>

Both these services were personal and uncertain.

Pecuniary satisfaction in lieu of personal attendance in knight-service, called *escuage* or *scutage*.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenant found means of compounding for it; by first sending others in their stead, and in process of time, making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money; and, in like manner it was called, in our Norman French, *escuage*; being indeed a pecuniary instead of a military service. The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these assessments, in the time of Henry II., seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent, by his *magna carta*, that no scutage should be imposed without consent of parliament.<sup>3</sup> But this clause was omitted in his son Henry III's charter; [ 75 ] where we only find,<sup>4</sup> that scutages or *escuage* should be taken as they were used to be taken in the time of Henry II.: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I., c. 5 & 6, and many subsequent statutes,<sup>5</sup> it was again provided, that the king should take no aids or tasks but by the common assent of the realm; hence it was held in our old books, that *escu-*

<sup>2</sup> Litt. s. 156.

<sup>3</sup> Cap. 37.

<sup>4</sup> *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.* Cap. 12.

<sup>5</sup> See Rights of Persons, [140.]

age or scutage could not be levied but by consent of parliament;<sup>b</sup> such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

Since therefore escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton<sup>c</sup> must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight service; that is, that this tenure (being subservient to the military policy of the nation) was respected<sup>d</sup> as a tenure in chivalry.<sup>e</sup> But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent: and the tenure, instead of knight-service, would have then been of another kind, called socage,<sup>f</sup> of which we shall speak in the next chapter.

For the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were

which render  
was uncertain, and dependent upon emergencies.

Consequences of the degenerating of knight-service into escuage;

[ 76 ]

and burthens incident thereto.

<sup>b</sup> Old Ten. tit. *Escuage*.

<sup>c</sup> Sec. 103.

<sup>d</sup> Wright, 122.

<sup>e</sup> *Pro feodo militari reputatur*. Flet.

l. 2, c. 14, s. 7.

<sup>f</sup> Litt. s. 97, 120.

liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith<sup>c</sup> very feelingly complains, “when he came to his own, after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren,” to reduce him still further, he was yet to pay half a year’s profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such a wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence of alienation*.

Occasional and partial redress of these grievances, and their final removal by the 12 Car. II. c. 24.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of king James I. consented,<sup>b</sup> in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it into execution, for removing the feudal grievance of heritable jurisdictions in Scotland,<sup>i</sup> which has since been pursued and effected by the statute 20 Geo. II. c. 43.<sup>k</sup> King James’s plan for exchanging our military tenures

<sup>c</sup> Commonw. l. 3, c. 5.

<sup>b</sup> 4 Inst. 202.

<sup>i</sup> Dalrymp. of Feuds, 292.

<sup>k</sup> By another statute of the same

year, (20 Geo. II. c. 50,) the tenure of *wardholding* (equivalent to the knight-service of England) is for ever abolished in Scotland.



seems to have been nearly the same as that which has been since pursued ; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee farm rent was to have been settled and inseparably annexed to the crown, and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient, seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages (having during the usurpation been discontinued) were destroyed at one blow by the statute 12 Car. II. c. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisin, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knight's-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage ; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself ; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour ; but the statute of king Charles extirpated the whole, and demolished both root and branches.<sup>1</sup>

A still further alteration of the law of tenures has been proposed by the Real Property Commissioners in their Third Report, as will be noticed in the ensuing pages. But it is proper here to observe, that they consider that the honorary services of grand serjeanty should be preserved.<sup>m</sup>

<sup>1</sup> Roger North, in his *Life of Lord Guildford*, observes, "It was somewhat unequal when the parliament took away the royal tenures *in capite* that the

lesser tenures of the gentry (meaning copyholds) were exposed to as grievous abuses as the former." Vol. i. p. 36, see *post*, chap. 11.

<sup>m</sup> Third Real Prop. Rep. p. 7.

## CHAPTER THE SIXTH.

## OF THE MODERN ENGLISH TENURES.

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1. Frank tenement.	{ 1. Knight service. 2. Socage or Freehold.	Grand Serjeanty. { 1. Free Socage. 2. Villein Socage.	{ 1. Petit Serjeanty. 2. Tenure in Burgage. 3. Gavelkind.
2. Villenage.	{ 1. Pure Villenage, or Copyhold. 2. Privileged Villenage, or Ancient demesne.		

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[ 78 ] ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since by the statute 12 Car. II. the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll were reserved; nay all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called free and common socage. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone to which we can recur, to explain any seeming or real difficulties that may arise in our present mode of tenure.

1. Knight service.

2. Socage.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure or *free-socage*, consisted also of

free and honourable services ; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) [ 79 ] almost every other species of tenure ; and this tenure, further, it is not proposed to alter ;<sup>a</sup> and to this we are next to proceed.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton ;<sup>b</sup> if a man holds by a rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*:" but if you add thereto any royal service, or escuage to any, the smallest, amount, "*illud dici poterit feodum militare*." So too the author of Fleta : "*ex donationibus, servitia militaria vel magnæ serjantie non continentibus, oritur nobis quoddam nomen generale, quod est socagium*." Littleton also<sup>d</sup> defines it to be, where the tenant holds his tenement of the lord by any certain service, in lieu of all other services ; so that they may be not services of chivalry, or knight-service. And therefore afterwards<sup>e</sup> he tells us, that whatsoever is not tenure in chivalry is tenure in socage : in like manner as it is defined by Finch,<sup>f</sup> a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage ; as to hold by fealty and 20s. rent ; or, by homage, fealty, and 20s. rent ; or, by homage and fealty without rent ; or, by fealty and certain corporal service, as ploughing the lord's land for three days ; or, by fealty only without any other service : for all these are tenures in socage.<sup>g</sup>

Definition of  
socage.

But socage, as was hinted in the last chapter, is of two sorts : *free-socage*, where the services are not only certain, but honourable : and *villein-socage*, where the services, though certain, are of a baser nature. Such as hold

Of two sorts ;  
free-socage  
and villein-  
socage.

<sup>a</sup> See 3d R. P. Rep. p. 8.

<sup>d</sup> Sec. 117.

<sup>e</sup> Sec. 118.

<sup>b</sup> L. 2, c. 16, s. 9.

<sup>f</sup> L. 147.

<sup>c</sup> L. 3, c. 14, s. 9.

<sup>g</sup> Litt. s. 117, 118, 119.

[ 80 ]

by the former tenure are called in Glanvil,<sup>b</sup> and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage. Of this tenure we are first to speak; and this, both in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word,<sup>i</sup> who derives it from the Saxon appellation soc, which signifies liberty or privilege, and, being joined to a usual termination, is called socage, in Latin *socagium*; signifying thereby a free or privileged tenure.<sup>j</sup> This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough: for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage, or plough-service.<sup>k</sup> But this by no means agrees with what Littleton himself tells us,<sup>l</sup> that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original (as escuage, which, while it remained uncertain, was equivalent to knight-service), the instant they were reduced to a certainty, changed both their name and nature, and were called socage.<sup>m</sup> It was the *certainty* therefore that denominated it a socage tenure; and nothing surely could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme*,<sup>n</sup> tells us, that they are "lands and tenements, whereof the nature of the fee is

<sup>b</sup> L. 3, c. 7.<sup>i</sup> Gavelk. 138.<sup>j</sup> In like manner, Skene, in his exposition of the Scots' Law, title *Socage*, tells us, that it is "ane kind of holding

of lands, quhen ony man is infeft freely," &amp;c.

<sup>k</sup> Litt. s. 119.<sup>l</sup> Sec. 118.<sup>m</sup> Litt. s. 98, 120.<sup>n</sup> C. 66.

socage its deriv.  
nation fr.  
"Soc." as.  
not fr.

"oca" - obsolesc.

changed by feoffment *out of chivalry* for *certain* yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be demanded." Which leads us also to another observation, that if socage tenures were of [ 81 ] such base and servile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II., a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunk ferme*, or tenure by socage. We may, therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself.

Taking this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honourable, as it was called, but at the same time more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure:° the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage* and *gavelkind*. Distinguish-  
ing marks of

We may remember, that by the statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it; for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation) are

° Wright, 211. /

Petit ser-  
jeanty:  
Definition of

[ 82 ]

still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by Littleton,<sup>p</sup> consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says,<sup>q</sup> is but socage in effect; for it is no personal service, but a certain rent: and, we may add, it is no predial service, or service of the plough, but in all respects *liberum et commune socagium*; only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *magna carta* respected it in this light, when it enacted,<sup>r</sup> that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty. The commissioners do not recommend any alteration in the law as to petit serjeanty.<sup>s</sup>

Tenure in  
burgage.

Tenure in *burgage* is described by Glanvil,<sup>t</sup> and is expressly said by Littleton,<sup>u</sup> to be but tenure in socage: and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain.<sup>v</sup> And here also the commissioners propose to make no alteration.<sup>w</sup> It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough<sup>x</sup> is usually distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have

<sup>p</sup> Sec. 159.

<sup>q</sup> Sec. 160.

<sup>r</sup> Cap. 27.

<sup>s</sup> Lib. 7, c. 3.

<sup>t</sup> Sec. 162.

<sup>u</sup> Litt. s. 162, 163.

<sup>v</sup> See 3d R. P. Rep. p. 8.

<sup>w</sup> See Rights of Persons, p. [114.]

amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough service; since the tenants must [ 83 ] have been citizens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plough, or was able to use one, if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in ancient burgage: the principal and most remarkable of which is that called *Borough-English*, so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil,<sup>a</sup> and by Littleton;<sup>c</sup> viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton<sup>a</sup> gives this reason; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors<sup>a</sup> have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest son; who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*,) till abolished by Malcolm III.<sup>b</sup> And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pas-

Borough  
English.

<sup>a</sup> *Ubi supra*.

<sup>c</sup> Sec. 165.

<sup>2</sup> Sec. 211.

<sup>a</sup> 3 Mod. Pref.

<sup>b</sup> Seld. tit. of hon. 2, 1, 47. *Reg. Mag.*

1. 4, c. 31.

[ 84 ] total life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from their father, which one became his heir.<sup>c</sup> So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements,<sup>d</sup> and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will,<sup>e</sup> which, in general, was not permitted after the conquest till the reign of Henry the Eighth, though in the Saxon times it was allowable.<sup>f</sup> A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty. This tenure by Borough English the commissioners propose entirely to abolish,<sup>g</sup> to which the legislature seems favourable.<sup>h</sup>

Gavelkind.

The nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some other parts of the kingdom,<sup>i</sup>) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm.<sup>j</sup> The dis-

<sup>c</sup> *Pater cunctos filios adultos a se pellebat, præter unum quem heredem sui juris relinquebat.* (Walsingh. Upodigm. Neustr. c. 1.)

<sup>d</sup> Litt. s. 166.

<sup>e</sup> Sec. 167.

<sup>f</sup> Wright, 172.

<sup>g</sup> 3d Real Prop. Rep. p. 8. The custom by borough English governs the descent of copyhold lands in various manors. 8 B. P. Rep. p. 8.

<sup>h</sup> See 4 & 5 Vict. c. 35, s. 79.

<sup>i</sup> Stat. 32 Hen. 8, c. 29; Kitch. of courts, 200. This custom governs the descent of copyholds in various manors. See 3d R. P. Rep. 8, and 4 and 5 Vict. c. 35, s. 79.

<sup>j</sup> *In toto regno, ante ducis adventum, frequens et usitata fuit: postea cæteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans: Cantianis solum in-*



tinguishing properties of this tenure are various: some of the principal are these; 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen.<sup>1</sup> 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "the father to the bough, the son to the plough";<sup>2</sup> but it escheats for want of heirs, and in felony, if the felon be outlawed.<sup>3</sup> 3. In most places the tenant had a power of devising lands by will, before the statute for that purpose was made.<sup>4</sup> 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together;<sup>5</sup> which was indeed anciently the most usual course of descent all over England,<sup>6</sup> [ 85 ] though in particular places particular customs prevailed. 5. The widow is dowable of one half instead of a third, and 6. The husband is tenant by the curtesy, whether there be issue born or not, but only of one half.<sup>7</sup> These, among other properties, distinguish this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain.<sup>8</sup> Wherefore, by a charter of king John,<sup>9</sup> Hubert, archbishop of Canterbury, was authorised to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight's-service; and by statute 31 Hen. VIII. c. 3, for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*. Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants: from all which I think it sufficiently clear, that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers. The commissioners propose entirely to abolish

*a species of  
socage tenure -*

*tegra et inviolata remansit.* (Analect.

l. 2, c. 7.)

<sup>1</sup> Lamb. Peramb. 614.

<sup>2</sup> Lamb. 684.

<sup>3</sup> Rob. Gal. 229.

<sup>4</sup> F. N. B. 198; Cro. Car. 561.

<sup>5</sup> Litt. s. 210.

<sup>6</sup> Glanvil. l. 7, c. 3.

<sup>7</sup> Rob. Gav. b. 2, c. 1. As to the ordinary estate in gavelkind, see *post*, chap. 9, III.

<sup>8</sup> Wright, 211.

<sup>9</sup> Spelm. cod. vet. leg. 355.

gavelkind ;<sup>†</sup> to which the legislature seem favourable, except in the county of Kent, where it has been recently expressly preserved."<sup>‡</sup>

Origin of  
socage  
tenure.

Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to shew that this also partakes very strongly of the feudal nature, which may probably arise from its ancient Saxon original ; since (as before was observed<sup>†</sup>) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after ; that in Kent it was preserved with a high hand, as our histories inform us it was ; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificance ; since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large ; till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton,<sup>‡</sup> their number and value began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

[ 86 ]

Incidents of  
socage  
tenure.

However this may be, the tokens of their feudal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry ; remarking their agreement or difference as we go along.

1. In the first place, then, both were held of superior lords ; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant.

2. Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from

<sup>†</sup> 3rd Real Prop. Rep. p. 12.

<sup>‡</sup> 4 & 5 Vict. c. 35, ss. 79, 80.

<sup>†</sup> Page 48.

<sup>‡</sup> Cap. 66.

its nature uncertain ; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty,) and so continues to this day.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant.<sup>x</sup> Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron ; if it be only for the reason given by Littleton,<sup>y</sup> that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) whether the land be holden of the lord or not ; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies.<sup>z</sup>

4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter,\* which were fixed by the statute Westm. I. c. 36, at 20s. for every 20*l.* *per annum* so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right ; but were all abolished, by the statute 12 Car. II. [ 87 ]

5. The tenant in free socage enjoyed the same right of alienation of his lands as the tenant by knight-service ; and his lands descended in the same manner.<sup>b</sup>

6. Relief is due upon socage tenure, as well as upon tenure in chivalry : but the manner of taking it is very different. The relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land ; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small:<sup>c</sup> and therefore Bracton<sup>d</sup> will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini.*

<sup>x</sup> Litt. s. 117, 131.

<sup>y</sup> Sec. 130.

<sup>z</sup> *Eo maxime præstandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (Corvin. jus.

feod. l. 2, t. 7.)

<sup>a</sup> Co. Litt. 91.

<sup>b</sup> Hale Hist. C. L. c. 11.

<sup>c</sup> Litt. sec. 126.

<sup>d</sup> L. 2, c. 37, s. 8.

So too the statute 28 Edw. I. c. 1, declares, that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due even though the heir was under age, because the lord had no wardship over him.<sup>c</sup> The statute of Charles II. reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee simple are holden by a rent, relief is still due of common right upon the death of a tenant.<sup>f</sup>

7. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service.<sup>g</sup> But tenancy *in capite* as well as primer seisins are, among the other feudal burthens, entirely abolished by the statute.

[ 88 ] 8. Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because, in this tenure no military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant: but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as hath been fully explained, together with the reason for it, elsewhere.<sup>h</sup> At fourteen this wardship in socage ceases; and the heir may oust the guardian, and call him to account for the rents and profits:<sup>i</sup> for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones.

<sup>c</sup> Lit. sec. 127.

<sup>g</sup> Co. Litt. 77.

<sup>f</sup> 3 Lev. 145.

<sup>h</sup> Rights of Persons, page [461.]

<sup>i</sup> Litt. sec. 123; Co. Litt. 89.

But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. II. c. 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the court of chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

9. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage.<sup>k</sup> For, the law, in favour of infants, is always jealous of guardians, [ 89 ] and therefore in this case it made them account, not only for what they *did*, but also for what they *might* receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but, the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late acts for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of king Edward's laws, that were restored by Henry the First's charter, as might alone convince us that socage was of a higher original than the Norman conquest.

10. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight service: for the statutes that relate to this point, and Sir Edward Coke's comment on them,<sup>l</sup> speak generally of all tenants *in capite*, without

<sup>k</sup> Litt. s. 123.

<sup>l</sup> Co. Litt. 43; 2 Inst. 65, 66, 67.

making any distinction : but now all fines for alienation are demolished by the statute of Charles the Second.

11. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service ; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs.<sup>m</sup>

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter : so that lands of both sorts are now holden by the one universal tenure of free and common socage, or, as it is now called, *freehold*.

Villanage.  
Of two sorts.

The other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villanage*, as contradistinguished from *liberum tenementum*, or frank tenure. And (this we may remember) he subdivides into two classes, *pure* and *privileged* villanage : from whence have arisen two other species of our modern tenures.

[ 90 ]

1. Pure Villanage : or copyholds.

III. From the tenure of pure villanage have sprung our present *copyhold* tenures, or tenure by copy of court roll at the will of the lord : in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

Manors ;  
what they  
are.

Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day :<sup>n</sup> just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium*, a *manendo*, because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages ; who kept in their own hands so much land as was necessary for the use of their families, which were called *terrae dominicales*, or *demesne* lands ; being occupied by the lord, or *dominus manerii*, and his servants. The other, or *tenemental*, lands they distributed among their tenants to be held of them in perpetuity : which from the different modes of tenure were distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents

Demesne  
lands.

Tenemental  
lands, are

book-land,  
and

<sup>m</sup> Wright, 210.

<sup>n</sup> Co. Cop. s. 2 & 10.

and free-services, and in effect differed nothing from free socage lands:<sup>o</sup> and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at the least, subject to escheat,<sup>p</sup> the manor itself is lost; but now indeed by statute 4 and 5 Vict. c. 35, s. 86, lords of manors, or their stewards, may hold customary courts, although no copyhold tenant be present, but these are not necessarily the courts baron.<sup>q</sup> [ 91 ]

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves; which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors: and his seignory is frequently termed an honour, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. In imitation whereof, these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*; till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits, of wardships, marriages,

<sup>o</sup> Co. Cop. s. 8.

*sed contra*, Long v. Heming, Cro.

<sup>p</sup> Glover v. Lane, 3 T. R. 447; Eliz. 219; and Co. Litt. 58, a.

<sup>q</sup> See post, Chap. 11.

and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terra-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of king John<sup>a</sup>) that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and, afterwards the statute of Westm. 3, or *quia emptores*, 18 Edw. I. c. 1, which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Ed. II. c. 6, and of 34 Edw. III. c. 15, by which last all subinfeudations, previous to the reign of king Edward I. were confirmed; but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day must have existed as early as king Edward the First: for it is essential to a manor, that there be tenants who hold of the lord; and, by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia tempores*, could create any new tenants to hold of himself.

Stat. of *quia emptores*, 18 Edw. I. c. 1.

[ 92 ]

When manors must originate.

Origin of copyholds.

Now with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, or Saxon; but mixed and compounded of them all; and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks,<sup>a</sup> a sort of people in a

<sup>p</sup> See the Oxford editions of the Charters.

<sup>a</sup> Wright, 215.

<sup>r</sup> Ibid.

<sup>s</sup> Introd. Hist. Eng. 59.



condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition.<sup>1</sup> This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as Sir Edward Coke tells us,<sup>2</sup> *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, [ 93 ] were either villeins *regardant*, that is annexed to the manor or land: or else they were in *gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another.<sup>3</sup> They could not leave their lord without his permission; but, if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices;<sup>4</sup> and their services were not only base, but uncertain both as to their time and quantity.<sup>5</sup> A vil-

<sup>1</sup> Wright, 217.<sup>2</sup> 1 Inst. 116.<sup>3</sup> Litt. sec. 181.<sup>4</sup> *Ibid.* s. 172.<sup>5</sup> *Ille qui tenet in villenagio faciet*

*quicquid ei præceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta.* (Bracton, l. 4, tr. l. c. 28.)

lein, in short, was in much the same state with us, as Lord Molesworth<sup>a</sup> describes to be that of the boors in Denmark, and which Steirnhook<sup>a</sup> attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity.<sup>b</sup>

[ 94 ] In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord:<sup>c</sup> and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property.<sup>d</sup> For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*.<sup>e</sup> In case of a marriage between a freeman and a neife, or a villein and a free-woman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because by another maxim of our law he is *nullius filius*; and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it.<sup>f</sup> The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill, or maim his villein; though<sup>g</sup> he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or, according to Blackstone, the maim of his own person, but this right of action for maihem

<sup>a</sup> Cap. 8.

<sup>b</sup> *De jure Saxonum*, l. 2, c. 4.

<sup>c</sup> Litt. sec. 177.

<sup>e</sup> Co. Litt. 140.

<sup>d</sup> Litt. sec. 202.

<sup>e</sup> Litt. s. 186.

<sup>f</sup> *Ibid.* s. 187, 188.

<sup>g</sup> *Ibid.* s. 189, 194.

is doubtful,<sup>b</sup> although he was subject to indictment at the king's suit.<sup>i</sup> Neifs indeed had also an appeal of rape, in case the lord violated them by force.<sup>k</sup>

Villeins might be enfranchised by manumission, which is either expressed or implied: express; as where a man granted to the villein a deed of manumission:<sup>l</sup> implied; as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years:<sup>m</sup> for this was dealing with his villein on the footing of a freeman; it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him;<sup>n</sup> for, as the lord might have a short remedy against his villein, by seising his goods (which was more than equivalent to any damages he could recover,) the law, which is always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law. [ 95 ]

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the goodnature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands, in spite of any determination of the lord's

<sup>b</sup> Mr. J. Coleridge's note.

<sup>i</sup> Co. Litt. 126 b.

<sup>k</sup> Litt. s. 190.

<sup>l</sup> *Ibid*, s. 204.

<sup>m</sup> Sec. 204, 5, 6.

<sup>n</sup> Sec. 208.

will. For, though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor: which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to shew for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court roll*, and their tenure itself a *copyhold*.<sup>o</sup>

Copyholders. Thus copyhold tenures, as Sir Edward Coke observes,<sup>p</sup> although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins,<sup>q</sup> who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will. Which [ 96 ] affords a very substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation.<sup>r</sup> For Sir Thomas Smith<sup>s</sup> testifies at a much earlier period, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of Popery. For he tells us, that "the holy fathers, monks, and friars, had in their confessions, and specially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one

<sup>o</sup> F. N. B. 12.

<sup>p</sup> Cop. s. 32.

<sup>q</sup> See contra Lord Loughborough's suggestion, *Astle v. Grant*, Dougl. 725.

<sup>r</sup> The last claim of villenage appears

to have been made in the fifteenth year of James I. *Rigg v. Culey*, Noy 27.

11 Harg. St. Tr. 342. See *ante*, p. 79.

<sup>s</sup> Commonwealth, b. 3, c. 10.

christian man to hold another in bondage: so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the church so much as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders: their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit-rent.<sup>t</sup>

As a farther consequence of what has been premised, we may collect these two main principles, which are held<sup>u</sup> to be the supporters of the copyhold tenure, and without which it cannot exist; 1. That the lands be parcel of, and situate within that manor under which it is held. 2. That they have been demised, or demisable, by copy of court roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day, nor can copyholds be created by operation of law.<sup>v</sup> [ 97 ]  
Supporters of copyholds.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only; for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or sti-

Different species of

<sup>t</sup> In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like; the lord usually finding them meat and drink, and sometimes (as is still the case in the highlands of Scotland) a minstrel or piper for their diversion. (*Rot. Maner. de Edgeware Com. Midd.*) As

in the Kingdom of Whidah, on the slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labour. (*Mod. Un.Hist.* xvi. 429.)

<sup>u</sup> Co. Litt. 58.

<sup>v</sup> *Revell. v. Joddrell.* 2 T. R. 415, 705.

pulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

Appendages  
of copyhold  
tenures.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services, (as well in rents as otherwise,) reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter<sup>w</sup> are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seised them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian by the custom of most manors, but is obliged usually to admit the nearest relation who cannot inherit the land as the guardian:<sup>x</sup> and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. In some few manors a fine is also payable on the death of the lord. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom: but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent; otherwise they amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of

<sup>w</sup> See ch. 29.

<sup>x</sup> 2 Watk. Cop. 101.

the estate.<sup>y</sup> From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shewn to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant. Copyhold lands usually descend, as lands held in free socage, but in some manors the customs of gavelkind and borough English prevail.<sup>z</sup>

Thus much for the ancient tenure of *pure villenage*, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

IV. There is yet a fourth species of *tenure*, described by Bracton, under the name sometimes of *Privileged Villenage*, and sometimes of *Villein Socage*. This, he tells us,<sup>a</sup> is such as has been held of the kings of England from the conquest downwards; that the tenants herein, "*Villana faciunt servitia, sed certa et determinata*;" that they cannot aliene or transfer their tenements by the strict common law conveyances of grant or feoffment, any more than pure villeins can; but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II.<sup>b</sup> subsisting at this day, *viz.* the tenure in *Ancient Demesne*; to

Privileged  
villenage.

[ 99 ]

<sup>y</sup> 2 Ch. Rep. 134. As to the recovery of these fines, see 11 Geo. 4, & 1 W. 4, c. 65; and see farther as to copyholds, *post*, chaps. 11 & 24.

<sup>z</sup> 3 R. P. Rep. 14. See 4 & 5 Vict. c. 35. s. 79.

<sup>a</sup> L. 4, tr. 1, c. 28.

<sup>b</sup> The 7th section of the statute for the Abolition of Tenures, 12 Car. 2, c. 24, provides that that act shall not alter or change any *tenure by copy* of Court Roll, or any *services* incident thereto.

which, as partaking of the baseness of villenage in the nature of its *services*, and the freedom of socage in their *certainty*, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

Ancient demesne.

*Ancient demesne* consists of those lands or manors which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the Great Survey in the Exchequer, called *Domesday Book*,<sup>c</sup> and the only mode of determining whether they be actually *ancient demesne* manors<sup>d</sup> or not, is by reference to that book, wherein the manors formerly in the possession of King Edward, are called *Terræ Regis Edwardi*, and those which belonged to the Conqueror<sup>e</sup> are named *Terræ Regis*.<sup>f</sup>

Tenants in ancient demesne of three kinds.

The tenants in *Ancient Demesne* are of three kinds,—1. *Tenants in Ancient Demesne*;—2. *Privileged Copyholders, Customary Freeholders, or Free Copyholders*;—and, 3. *Copyholders of base tenure*.<sup>g</sup>

1. Tenants in ancient demesne.

1. *Tenants in Ancient Demesne* are those who hold their lands *freely* by grant from the crown, being only bound in respect of their *lands* to perform some of the *better* sort of villein *services*, but those determinate and *certain*; as, to plough the king's land for so many days, to supply his *court* with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents, and in consideration bereof they had many immunities and privileges granted to them,<sup>h</sup> as to try the right of their property in a peculiar court of their own, called a Court of *Ancient Demesne*,<sup>i</sup> by a peculiar pro-

<sup>c</sup> F. N. B. 14, 56.

<sup>d</sup> 2 Burrow's Rep. 1048; Private Wrongs, ch. 23, p. [331.]

<sup>e</sup> As nearly as can be ascertained, King William the Conqueror himself held 1290 manors, exclusive of berewicks and sokes. Of these, about 350 had, in some shape, belonged to the Crown; they are spoken of as the King's, or had been old *Demesne de firma Regni*. About 165 are entered as having been held by King Edward

the Confessor.—See Sir H. Ellis's General Introduction to Domesday Book, Vol. 1, p. 476, nota.

<sup>f</sup> See Scriven on Copyholds, p. 651, and the cases there referred to.

<sup>g</sup> See Scriven on Copyholds, Chap. 16, Of *Ancient Demesne*, p. 656.

<sup>h</sup> 4 Inst. 269.

<sup>i</sup> The Court of *Ancient Demesne* is a court baron, and not a Court of Record. 4 Inst. 269. A plea to the jurisdiction of a superior Court is al-



cess, denominated a writ of *right close*;<sup>k</sup> to have a writ of *monstraverunt*; not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries,<sup>l</sup> and the like.

2. *Privileged Copyholders, Customary Freeholders,*<sup>m</sup> or *free Copyholders*, are such as *generally* hold their lands of a manor which is *ancient demesne*, according to the custom of the manor, but *not* at the will of the lord; and they also had, in respect of their *lands*, the same *privileges* as the former. These tenants, therefore, [ 100 ] though their tenure be absolutely *copyhold*,<sup>n</sup> yet have an *interest* equivalent to a freehold;<sup>o</sup> for notwithstanding their services were of a base and villenous original,<sup>p</sup> yet the tenants were esteemed in all other respects to be highly privileged villeins, and especially for that their services were fixed and determinate, and that they could not be compelled (like *common copyholders*, and *copyholders of base tenure*) to relinquish these tenements at the lord's will, or to hold them against their own;<sup>q</sup> "*et ideo*," says Bracton, "*dicuntur liberi*." Britton also, from such their freedom, calls them absolutely *sokemans*, and their tenure *sokemanries*; which he describes<sup>r</sup> to be "lands

2. Privileged copyholders.

lowed, that the lands are *ancient demesne*, holden of the King's manor. 10 East, 523; 2 Burr. 1046; 8 T. R. 474; 3 Wils. 51; and see 1 Chitty on Pleading, 477—480.

<sup>k</sup> F. N. B. 11. But see 3 & 4 W. 4, c. 27, s. 36.

<sup>l</sup> Tenants in ancient demesne and copyholders, were first made liable to serve on juries in the King's Courts by statute 4 & 5 W. & M. c. 24, s. 15; which statute was repealed, but the like provisions are continued by the consolidated act, 6 G. 4, c. 50, s. 1.

<sup>m</sup> The term *customary freeholders* is incorrect, and apt to mislead the student; for these tenants hold their lands by *copy* of court roll, and are in fact *copyholders*; therefore, the term *free copyholders* is more correct.

<sup>n</sup> In general, the nature and inci-

dents of *customary freeholds* are the same as those of *common copyholds*, and they are regulated by the same rules of law. 4 East, 271, and 7 East, 321.

<sup>o</sup> The tenants have not, legally speaking, a *freehold* interest, but an interest nearly *as good as* freehold; for it has long been settled, that the *freehold* is *generally* in the lord, as it is in *common copyholds*. See *Stephenson v. Hill*, 3 Burr. 1278; 8 Bos. & P. 378; 1 B. & C. 448. Though, where the *special* custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenements, the freehold is not in the lord, but in the tenant. *Bingham v. Woodgate*, 1 Russ. & Mylne, 32.

<sup>p</sup> Gilb. Hist. of Exch. 16 & 30.

<sup>q</sup> See Hargr. Co. Litt. n. 1, 59 b.

<sup>r</sup> C. 66.

and tenements, which are not held by knight service, nor by grand serjeanty, nor by petit, but by simple services; being, as it were, lands enfranchised by the King, or his predecessors, from their *ancient demesne*." And the same name is also given them in Fleta.<sup>4</sup> Hence Fitzherbert observes,<sup>5</sup> that no lands are ancient demesne, but lands holden in socage, that is, not in *free* and *common* socage, but in this amphibious subordinate class of *villein* socage. And it is possible, that as this species of socage tenure is founded upon predial services, or services of the plough; it may have given cause to imagine, that all socage tenures arose from the same original, for want of distinguishing, with Bracton, between free socage, or socage of frank tenure, and villein socage, or socage of ancient demesne.

3. Copyholders of base tenure.

And, 3, *copyholders of base tenure*, are those who also hold their lands of a *manor*, which is ancient demesne, but merely at the lord's will, and cannot have either a writ of

<sup>4</sup> Lord Coke calls them (Cop. a. 89,) "*copyholds of frank tenure*," and remarks, that they are most usual in *ancient demesne*; though sometimes out of ancient demesne we meet with the like sort of copyholds. To the latter kind, may be referred those *customary* tenements in the north of England, which are parcels of the respective manors in which they are situate, and descendible from ancestor to heir by the hereditary right, called *tenant-right*, and are held of the lord according to the *custom* of the manor. See *Burrell v. Dodd*, 3 Bos. & Pul. 878. These customary estates, known by the denomination of *tenant-right*, are peculiar to the northern parts of England, in which border services against Scotland were anciently performed. And although these appear to have many qualities and incidents, which do not properly and ordinarily belong to *villeinage* tenure, either *pure* or *privileged*, (and out of one or other of these species of villenage all copyhold is derived,) and also have some, which savour more of military tenure by

*escuage* uncertain, which according to Littleton (s. 99,) is *knight's service*; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz.:—the being holden at the will of the lord, and also the usual evidence of title by copy of court roll; and are alienable also, contrary to the usual mode by which copyholds are aliened, viz.: by deed and admittance thereon:—notwithstanding all these anomalous circumstances, it seems to be now so far settled that these *customary tenant-right* estates are not freehold, but that they in effect fall within the same consideration as copyholds.—Per *Ellenborough, C. J.* in *Doe d. Reay v. Huntington*, 4 East, 288. And see *Doe v. Llewellyn*, 5 Tyr. 899. 2 C. M. & R. 508. In the county palatine of Durham, customary estates, or free copyholds, held of the bishop as lord of the manor, are not uncommon.

<sup>4</sup> L. 1, c. 8.

<sup>5</sup> N. B. 13.

*right-close*, or *monstraverunt*, but must sue by plaint in the lord's court.<sup>v</sup> These tenants are probably those who, as Britton testifies,<sup>z</sup> continued for a long time pure and absolute villeins, dependent on the will of the lord; and they who have succeeded them in their tenures, now differ from *common* copyholders in only a few points.<sup>7</sup>

But the *first* and *second* kinds of these tenants differ from *common* copyholders, principally in the *privileges* before mentioned; as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton, and remaining to this day, *viz.* that they cannot convey their lands from man to man by the general *common law* conveyances *alone*, of feoffment, and the rest; but must pass them by deed<sup>a</sup> and admittance, or by surrender to the lord or his steward, in the manner of common copyholds: yet with this distinction,<sup>a</sup> that in the admittance<sup>b</sup> or surrender of these lands in ancient demesne, it is not [ 101 ] used to say, "to hold at the will of the lord," (except in copyholds of *base* tenure,) in their copies;<sup>c</sup> but only, "to hold according to the *custom*"<sup>d</sup> of the manor.

The Real Property Commissioners propose to convert the tenure of ancient demesne into free and common socage.<sup>e</sup>

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of Tenures, both ancient and modern; in which we cannot but remark

<sup>v</sup> Fitzherbert, Nat. Brev. 12.

<sup>z</sup> C. 66.

<sup>7</sup> F. N. B. 228.

<sup>a</sup> By special *custom*, these lands may pass by surrender and admittance, or by surrender, or by deed and admittance, or by deed; but where they are transferred by deed, the conveyance must, in general, be enrolled in the manor court, where only the tenant is impleadable. Watkins on Copyholds, edit. Coventry, p. 60, vol. 1, note.

<sup>a</sup> Kitchen on Courts, 194.

<sup>b</sup> The admittance is *tenendum*, but not *ad voluntatem domini*. Hal. MS. As to alienation by *special custom*, see post, ch. 24.

<sup>c</sup> This term, which is now at this day called *copy tenants*, or *copyholders*, or *tenants by copy*, is but a new found term, for of ancient times they were called *tenants in villenage*, or of *base tenure*. Fitz. N. B. 12. c.

<sup>d</sup> The form of the *habendum* and *reddendum*, in the surrender of customary or free copyholds, is as follows:—"To have to the said C. D., and his sequels in right, according to the *custom* of the Court, *rendering*, therefore, by the year, at the usual terms as before was wont to be rendered, and doing to the lord and the neighbours, the duties and services accustomed by pledges, and so forth."

<sup>e</sup> See 3 R. P. Rep. 13.

Lay tenures  
in effect re-  
duced to two.

the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to the Restoration, (12 Car. 2.) all *lay* tenures are now in effect reduced to *two* species; *free* tenure in common socage, and *base* tenure by copy of court roll.<sup>f</sup>

I mentioned *lay* tenures only, because there is still behind another species of tenure, reserved by the statute of Charles the Second, which is called—

Spiritual  
tenure: of  
two sorts.

*Spiritual Tenure*, from its services being entirely spiritual. This includes *two* sorts.—1. Tenure in *Frankalmoign*; and 2. Tenure by *Divine Service*.

1. Tenure of  
frankal-  
moign.

1. Tenure in *frankalmoign*, in *liberâ eleemosynâ*, or *free alms*, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever.<sup>g</sup> The service which they were bound to render for these lands, was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive, and, therefore, they did no fealty, (which is incident to all other services but this);<sup>h</sup> because this divine service was of a higher and more exalted nature.<sup>i</sup> This is the tenure by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day,<sup>k</sup> the nature of the service being upon the reformation altered, and made conformable to the purer doctrines of the church of England. It was an old Saxon tenure, and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in ancient

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<sup>f</sup> Copyholders, customary tenants, and tenants in ancient demesne, have in some respects, an equality with freeholders; and among other liberties, the franchise of voting for members of parliament, has been extended to them by the Reform Act, 2 W. 4, c. 45, and the power of devising by the Wills Act, 1 Vict. c. 26, s. 3. See Rights of Persons, [178].

<sup>g</sup> Litt. sec. 133.

<sup>h</sup> *Ibid.* s. 131.

<sup>i</sup> So Lord Coke observes,—“It is also said in our books, *que frankalmoign est le plus haute service*.” (Co. Litt. 95 b.) And Littleton reasons, “because that this divine service is better for them.” Litt. s. 135.

<sup>k</sup> Bracton, l. 4, tr. 1. c. 28, s. 1.

*moign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions,<sup>1</sup> just as the Druids, among the ancient Britons, had *omnium rerum immunitatem*.<sup>m</sup> And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely *spiritual*. For if the service be neglected, the law gives no remedy by distress or otherwise, to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor, to correct it.<sup>n</sup>

Wherein it materially differs from what was called—

2. Tenure by *Divine Service*, in which the tenants were obliged to do some special *divine services* in *certain*, as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms,<sup>o</sup> especially as for this, if unperformed, the lord might distrain without any complaint to the visitor;<sup>p</sup> and in this tenure, it seems, that fealty was due.<sup>q</sup> All such donations are, indeed, now out of use; for, since the statute of *quia emptores*, 18 Edw. 1, none but the king can give lands to be holden by *spiritual tenure*.<sup>r</sup> So that I only mention *frankalmoign*, and tenure by *divine service*, because the former is excepted by name in the statute of Charles II., and the latter is not affected by it, and therefore they subsist in many instances at this day. It may further be observed that the Real Property Commissioners do not propose to make any alterations either in tenure in *frankalmoign*, or in tenure by *divine service*.<sup>s</sup> Which is all that shall be remarked concerning them; herewith concluding our observations on the nature of tenures.

Tenure by  
divine ser-  
vice.

<sup>1</sup> Seld. Jan. 1, 42.

<sup>m</sup> Oesmar de Bell. Gall. l. 6, c. 13.

<sup>n</sup> Litt. s. 136.

<sup>o</sup> The old books divide *spiritual* tenure, into *free alms*, (which was free from any *certain*;) and *alms*, because the tenants were bound to *certain* divine services. And the tenure in *alms*, or tenure by *divine service*,

Britton (fo. 164.) calls tenure *en au-mone*. Co. Litt. 97 a.

<sup>p</sup> Litt. s. 137.

<sup>q</sup> Litt. s. 137. Fealty was incident to every tenure but *frankalmoign*; and where the lord might distress, there was fealty due. Co. Litt. 97 a.

<sup>r</sup> Litt. s. 140.

<sup>s</sup> See 3 R. P. Rep. p. 7.

## CHAPTER THE SEVENTH.

### OF USES AND TRUSTS.

Importance  
of the doc-  
trine of uses  
and trusts.

WE here propose to give a brief account of the doctrine of uses and trusts, a learning which pervades the whole system of the law of real property, and without some knowledge of which, it is impossible to understand either its theory or its practice. The introduction of uses and trusts, and the passing of the Statute of Uses, almost entirely subverted the feudal system, and the tenures which arose out of it. Nearly all the assurances now employed, operate by virtue of this statute; and we shall see in the ensuing portions of this work what important alterations the doctrine of uses has made, being in fact the foundation of the modern system of conveyancing. This place<sup>a</sup> appears on the whole the most convenient for introducing an outline of this somewhat difficult learning, which, however, the student will more perfectly understand when he is acquainted with the rest of this volume.

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Uses and  
trusts: what  
they are.

Uses and trusts are in their original of a nature very similar, answering more to the *fidei-commisum* than the *usus fructus* of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance.<sup>b</sup> But the *fidei commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *prætor fidei commissarius*, instituted by Augustus, to enforce the observance of this confidence.<sup>c</sup> So that the

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<sup>a</sup> There has been here a transposition of Blackstone's text, as to which see Introduction, and *post*, chap. 22.

<sup>b</sup> Ff. 7, 1, 1.

<sup>c</sup> Inst. 2, tit. 23.

right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice: which occasioned that known division of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law: *jus fiduciarium*, a right in trust, for which there was a remedy in conscience, and *jus precarium*, a right in courtesy, for which the remedy was only by entreaty or request.<sup>d</sup> In our law a use might be ranked under the right of the second kind, being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestui que use*, or him to whose use it was granted, and suffer him to take the profits.\* As, if a conveyance was made to *A.*, and his heirs, to the use of (or in trust for) *B.* and his heirs; here at the common law *A.*, the *terre-tenant*, had the legal property and possession of the land, but *B.*, the *cestui que use*, was in conscience and equity to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III.,<sup>f</sup> by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of the religious houses*:<sup>g</sup> which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction, which Augustus had vested in his *prætor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that, though by law the lands themselves were not devisable, yet, if a testator had [ 329 ] enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by will. But we shall see<sup>h</sup> how this evasion was crushed in its infancy by statute 25 Ric. II. c. 5, with respect to religious houses.

Yet the idea being once introduced, however fraudulently, afterwards continued to be often innocently,

Progress of  
the doctrine  
of Uses.

<sup>d</sup> Fl. 43, 26. 1. Bacon on Uses, 8vo., 306.

<sup>e</sup> Plowd, 352.

<sup>f</sup> Stat. 50 Edward III. c. 6, 1 Ric. II. c. 9; 1 Rep. 139.

<sup>g</sup> See *post*, ch. 20.

<sup>h</sup> *Ibid.*

and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require, and moreover uses were not liable to forfeiture.<sup>1</sup> Till, at length, during our long wars in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal: through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attained the other. Wherefore about the reign of Edward IV., (before whose time Lord Bacon remarks,<sup>k</sup> there are not six cases to be found relating to the doctrine of uses,) the courts of equity began to reduce them to something of a regular system.

Originally it was held that the Chancery could give no relief, but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry the Sixth, with respect to the heir,<sup>l</sup> and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use.<sup>m</sup> But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence; so might a creditor obtaining execution.<sup>n</sup> And also it was held that neither the King or Queen, [ 330 ] on account of their dignity royal,<sup>o</sup> nor any corporation aggregate, on account of its limited capacity,<sup>p</sup> could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust.

<sup>1</sup> See *post*, ch. 20.

<sup>k</sup> On uses, 313. But see 2 Leon. 14, where the origin of uses is referred to a much earlier period.

<sup>l</sup> Keilw. 42; Year Book, 22 Edw. 4, 6.

<sup>m</sup> Keilw. 46; Bacon of uses, 312.

<sup>n</sup> Gilb. Us. by Sugd. 15, 16.

<sup>o</sup> Bro. Abr. tit. Feoffm. al. uses, 31; Bacon of uses, 346, 347.

<sup>p</sup> Bro. Abr. tit. Feoffm. al. uses, 40; Bacon, 347.



And, if the releasee to uses died without heir, or committed a forfeiture, or married, neither the lord, who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use;<sup>a</sup> because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

On the other hand, the use itself, or interest of *cestui que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities, *quæ ipso usu consumuntur*:<sup>c</sup> or whereof the seisin could not be instantly given.<sup>d</sup> 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without any consideration, equity presumes that he meant it for the use of himself:<sup>e</sup> unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions.<sup>f</sup> But, if either a good or a valuable consideration appeared, equity would immediately raise a use correspondent to such consideration. 3. Uses were<sup>g</sup> descendible according to the rule of the common law, in the case of inheritances in possession;<sup>h</sup> for in this and many other respects *æquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties,<sup>i</sup> or be devised by last will and testament:<sup>j</sup> for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestui que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee;<sup>k</sup> to whom he was accounted by

Rules relating to uses before the statute.

[ 331 ]

<sup>a</sup> 1 Rep. 122.

<sup>c</sup> 1 Jon. 127.

<sup>d</sup> Cro. Eliz. 401.

<sup>e</sup> See *post*, ch. 22.

<sup>f</sup> 1 And. 37.

<sup>g</sup> Moor. 684.

<sup>h</sup> 2 Roll. Abr. 780.

<sup>i</sup> Bacon of Uses, 312.

<sup>j</sup> *Ibid.* 308.

<sup>k</sup> Stat. 1 Ric. 3. c. 1.

law to be only tenant at sufferance.<sup>b</sup> 5. Uses were not liable to any of the feudal burthens; and particularly did not escheat for felony or other defect of blood: for escheats, &c. are the consequence of tenure, and uses are held of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use.<sup>c</sup> 6. No wife could be endowed, or husband have his curtesy, of a use:<sup>d</sup> for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures.<sup>e</sup> 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestui que use*.<sup>f</sup> For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

[ 332 ] It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtle disquisitions) deduced from this child of the imagination; when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of Lord Bacon's complaint,<sup>g</sup> that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to bring his action or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences, abundance of statutes were provided, which made the lands liable to be extended by the

<sup>b</sup> Bro. Abr. *Ud.* 23.

<sup>c</sup> Jenk. 190.

<sup>d</sup> 4 Rep. 1; 2 And. 75.

<sup>e</sup> See *post*, ch. 9.

<sup>f</sup> Bro. Abr. tit. *Executions*, 90.

<sup>g</sup> Use of the Law, 158.

creditors of *cestui que use*;<sup>h</sup> allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits;<sup>i</sup> made him liable to actions of waste;<sup>k</sup> established his conveyances and leases made without the concurrence of his feoffees;<sup>l</sup> and gave the lord the wardship of his heir, with certain other feudal perquisites.<sup>m</sup>

These provisions all tended to consider *cestui que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 29 Hen. VIII. c. 10, which is usually called the *statute of uses*, or, in conveyances and pleadings, the *statute for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of King Richard III.; who having, when Duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an act of parliament was immediately passed,<sup>n</sup> which ordained that, where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestui que use* in like manner as he had the use. And so the statute of Henry VIII., which after reciting the various inconveniences before-mentioned, and many others, enacts, that when any person shall be *seised* of lands, &c., to the use, confidence, or trust, of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, or in remainder or reversion, shall from thenceforth stand and be seised or possessed of the land, &c. of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner,

Statute of  
uses, 29 Hen.  
8, c. 10.

[ 333 ]

<sup>h</sup> Stat. 50 Edw. 3, c. 6; 2 Ric. 2, sess. 2, c. 3; 19 Hen. 7, c. 15.

<sup>i</sup> Stat. 1 Ric. 2, c. 9; 4 Hen. 4, c. 7, c. 15; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1.

<sup>k</sup> Stat. 11 Hen. 6, c. 5.

<sup>l</sup> Stat. 1 Ric. 3, c. 1.

<sup>m</sup> Stat. 4 & 5 Hen. 7, c. 17; 19 Hen. 7, c. 15.

<sup>n</sup> 1 Ric. 3, c. 5.

Which executes the use.

form, and condition as they had before in the use. The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession, thereby making *cestui que use* complete owner of the lands and tenements, as well at law as in equity. Thus if an estate is limited to *A.* and his heirs, to the use of *B.* and his heirs, *B.*, by force of the statute, takes an estate in fee-simple, without entry, and *A.* takes nothing.<sup>o</sup> If the estate had been limited to *A.* and his heirs, to the use of *B.* for life or for years, *B.* would have taken an estate for life or for years, without entry, and the reversion would have resulted to the grantor. The seisin upon which the use arises, must, however, be co-extensive with the use. Thus, if lands be given to *A.* and *B.* during their lives, to the use of *C.*, *C.*'s estate only lasts during the lives of *A.* and *B.*, for the seisin to serve the use was only for their lives, and *C.* can therefore take no larger estate in the use.<sup>p</sup>

Since the statute the courts of law take cognizance of uses.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the releasee, and turned the interest of *cestui que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in Chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the Judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the accidents that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the releasee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such releasee; because the legal estate never rests in him for a moment, but is instan-

<sup>o</sup> *James v. Plant*, 4 Ad. & El. 766.

<sup>p</sup> Gilb. Us. 66, 229.

taneously transferred to *cestui que use*, as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestui que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

The various necessities of mankind induced also the [ 334 ] judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the mean while the ancient use shall remain in the original grantor; as, when lands are conveyed to the use of *A.* and *B.*, after a marriage shall be had between them,<sup>4</sup> or to the use of *A.* and his heirs till *B.* shall pay him a sum of money, and then to the use of *B.* and his heirs.<sup>5</sup> Which doctrine, when devised by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favour of *executory devises*.<sup>6</sup> But herein these, which are called *contingent* or *springing* uses, differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the releasee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever:<sup>7</sup> whereas by an executory devise the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee;<sup>8</sup> because, though that was forbidden by the common law in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee simple, such subsequent uses (after a use in

Rules relating to uses since the statute.

Contingent or springing uses.

<sup>4</sup> 2 Roll. Abr. 791; Cro. Eliz. 439.

<sup>5</sup> Bro. Abr. tit. Feoffm. al. Uses, 30.

<sup>6</sup> See *post*, ch. 13.

<sup>7</sup> 1 Rep. 134, 138; Cro. Eliz. 439.

<sup>8</sup> Pollexf. 78; 10 Mod. 423.

fee) were before the statute permitted to be limited in equity; and then the statute executed the legal estate in the same manner, as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto*;<sup>w</sup> as, if A. [ 335 ] makes a feoffment to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both.<sup>x</sup> This is sometimes called a *secondary*, sometimes a *shifting*, use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first born son in tail: here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and if she dies without issue, the whole results back to him in fee.<sup>y</sup> Or if a man makes a feoffment in fee to another without any consideration, equity presumes that he meant it to be to the use of himself, and will raise an implied use for his own benefit.<sup>z</sup> It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided that the grantor reserved to himself such a power at the creation of the estate; whereas, the utmost that the common law would allow, was a deed of defeazance, coeval with the grant itself, (and therefore esteemed a part of it,) upon events specifically mentioned.<sup>a</sup> And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead.<sup>b</sup> And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who, (as Lord Bacon observes<sup>c</sup>) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

Secondary or  
shifting uses.

Resulting  
use.

Uses arising  
under powers

<sup>w</sup> Bro. Abr. tit. Feoffm. al. Uses;  
30.

<sup>x</sup> Bacon of Uses, 351.

<sup>y</sup> *Ibid.* 350; 1 Rep. 120.

<sup>z</sup> 1 Sand. Us. 100. 4th ed.

<sup>a</sup> See *post*, chap. 22.

<sup>b</sup> Co. Litt. 237.

<sup>c</sup> On Uses, 316.

By this equitable train of decisions in the courts of law, the power of the court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use,"<sup>d</sup> and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant, and therefore void.<sup>e</sup> And therefore, on a feoffment to *A.* and his heirs, to the use of *B.* and his heirs, in trust for *C.* and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting, that the instant the first use was executed in *B.*, he became seised to the use of *C.*, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down, through a hundred uses upon uses, till finally executed in the last *cestui que use*. And where *A.* bargains and sells for a pecuniary consideration to *B.* the legal estate by force of the statute passes to *B.*, and the judges held that if there was a further limitation to the use of *C.*, *C.* took nothing at law.<sup>f</sup> Again; as the statute only mentions such persons as were *seised* to the use of the others, this was held not to extend to existing terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed*;<sup>g</sup> and therefore if a term of one thousand years already in existence be assigned by the termor to *A.*, to the use of (or in trust for) *B.*, the statute does not execute this use, but leaves it as at common law.<sup>h</sup> But this must be distinguished from the original creation of the term out of the fee. As where *A.* seised in fee limits a term to *B.* for one thousand years, here there is a person capable of serving the seisin, and this will be an interest which the statute will execute.<sup>i</sup> And lastly, (by more modern resolutions) where lands are given to one and his heirs, in trust to

The jurisdiction of the courts of equity.

[ 336 ]

<sup>d</sup> Dyer, 155.

<sup>e</sup> 1 And. 37, 136.

<sup>f</sup> Tyrrell's case, Dy. 155.

<sup>g</sup> Bacon, Law of Uses, 335; Jenk. 244.

<sup>h</sup> Poph. 76; Dyer, 369.

<sup>i</sup> Gilb. Us. 80.

receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust.<sup>k</sup>

Doctrine of trusts.

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first two cases it was evident that *B.* was never intended by the parties to have any beneficial interest; and, in the third, the *cestui que use* of the term was expressly driven into the court of Chancery to seek his remedy: and therefore that court determined, that though these were not *uses*, which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed.<sup>l</sup> To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*: and thus, by means of this doctrine of trusts, to use the words of Lord Mansfield,<sup>m</sup> a noble, rational, and uniform system has been raised, which is made to answer the exigencies of family and all useful purposes, without producing one inconvenience, fraud, or private mischief, which the Statute of Uses meant to avoid. It has been said,<sup>n</sup> that trusts are now much the same as uses were before the statute. A use indeed, before the Statute of Uses was, as a trust is since, a *fiduciary* or beneficial interest, distinct from the legal estate, and so far the expression is correct: but though there is no difference in the principles, there is a

[ 337 ]  
Rules as to trusts.

wide difference in the exercise of them.<sup>o</sup> The courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The Statute of Frauds, 29 Car. II. c. 3, having required that every declaration, assignment, or grant of any trust in lands or hereditaments, (except such as arise from implication or construction of law,) shall be made in writing signed by the party, or by his written will; the courts now consider a trust estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed

<sup>k</sup> 1 Equ. Cas. Ab. 383, 384; 1 Sand. Us. 244. *Doe v. Scott*, 4 Bing. 507.

<sup>l</sup> 1 Hal. P. C. 248.

<sup>m</sup> 1 Wm. Bla. 160.

<sup>n</sup> See *ante*, p. 108.

<sup>o</sup> 1 Wm. Bla. 180; 1 Sand. Us. 266, 4th edit.



by the same rules of property, and liable to every charge in equity, which the other is subject to in law : and, by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate unless by alienation for a valuable consideration to a purchaser without notice;<sup>p</sup> which, as *cestui que trust* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances, (by the express provision of the Statute of Frauds<sup>q</sup>) to leases and other incumbrances, nay even to the curtesy of the husband, as if it was an estate at law ; and it has recently<sup>r</sup> been subjected to dower. It hath also been held not liable to forfeiture (except in the case of treason) nor<sup>s</sup> to escheat to the lord, in consequence of attainder or want of heirs :<sup>t</sup> because the trust could never be intended for his benefit. The trust is usually called the *trust estate*, in contradistinction to the legal estate, and the person having the beneficial interest in the trust estate, the *cestui que trust*. The estate of the trustee is at law subject to all the incidents which attend the ownership of land, but he is compellable in a court of equity to convey the legal estate in such way as the *cestui que trust* shall direct ; and when he becomes disqualified or is out of the jurisdiction of the court, or in any other respect incompetent to discharge the trust, the court will appoint some person to make the conveyance. It is to be further observed, that where an estate may take effect either by the rules of common law or by the statute of uses, it will take effect under the common law. Thus where lands are limited to *A.* to the use of *A.*, *A.* will take by virtue of the common law,<sup>u</sup> but if an estate be limited on *A.*'s seisin

<sup>p</sup> 2 Freem. 43.<sup>q</sup> And see also 1 & 2 Vict. c. 110, s. 11.<sup>r</sup> See *post*, ch. 9.<sup>s</sup> 33 Hen. 8, c. 20, *Attorney-General v. Crofts*, 4 B. P. C. 136. 1

Sand. Us. 206.

<sup>t</sup> Hard. 494, *Burgess v. Wheat*, 1 Eden, 186, H. Bla. 121.<sup>u</sup> *Samme's case*, 13, Co. 56, *Long v. Buckeridge*, 1 Stra. 106 ; *Gwain v. Roe*, 1 Salk. 90.

to the use of *B.*, then *A.* is in by virtue of the statute of uses, and *B.* takes an equitable estate.\*

Use of the statute.

[ 338 ] The only service, as was before observed, to which the statute of uses is now consigned, is in giving efficacy to certain species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds. These conveyances, as we have already observed, are now principally adopted in the transfer of real property; and have nearly superseded the ancient mode of conveyance at common law, as will be more fully seen in the twenty-first chapter of this volume.

\* *Girland v. Sharp*, Cro. Eliz. 382; *Attorney-General v. Scott*, Cas. temp. Talb. 139.

## CHAPTER THE EIGHTH.

## OF FREEHOLD ESTATES OF INHERITANCE. [ 103 ]

THE next objects of our disquisition are the nature and properties of *estates*. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath therein; so that if a man grant all *his estate* in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby.\* It is called in Latin *status*; it signifying the condition, or circumstance in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and, thirdly, with regard to the *number and connections* of the tenants.

Estate, what  
it is.

To be considered in a  
three-fold  
light.

First, with regard to the *quantity of interest* which the tenant has in the tenement; this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

First as to  
the quantity  
of interest.

Estates divided into  
freehold and  
less than  
freehold.

An estate of freehold, *liberum tenementum*, is an interest [ 104 ]

\* Co. Litt. 345 a; but see *Derby v. Taylor*, 1 East, 502, in which it was held that the insertion of the common clause of "all the estate," has not this

effect when it follows a particular description of the land conveyed, but is controlled by that description. See the clause, Appendix, No. I, p. i.

in lands, or other real property, held by a free tenure for the life of the tenant, or that of some other person, for some uncertain period.<sup>a</sup> It is called *liberum tenementum*, frank tenement, or freehold, and was formerly correctly described to be such an estate as could only be created by livery of seisin, a ceremony similar to the investiture of the feudal law. And accordingly it is laid down by Littleton,<sup>b</sup> that when a freehold shall pass, it behoveth to have livery of seisin. But since the introduction of certain modern conveyances, founded on the Statute of Uses,<sup>c</sup> by which an estate of freehold may be created without livery of seisin, this description is not sufficient.<sup>d</sup>

Estates of freehold are either estates of inheritance or estates not of inheritance. Estates of inheritance are either inheritances in fee-simple or limited fees.  
1. Tenant in fee-simple.

Estates of freehold, thus understood, are either estates of *inheritance*, or estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee-simple; and inheritances *limited*, one species of which we usually call fee-tail.

1. Tenant in fee-simple (or, as he is frequently styled, tenant in fee,) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever; generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*), is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium*;<sup>e</sup> which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium* and therefore is said to be seised thereof absolutely in *dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service: in which superior, the ultimate property of the land resides. And therefore Sir Henry Spelman<sup>2</sup> defines a feud or fee to be the right which the vassal or tenant hath in

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Difference between feudal and allodial property.

<sup>a</sup> Britt. c. 32; St. Germyn, D. & S.  
<sup>b</sup> 2, d. 22.

<sup>c</sup> § 59.

<sup>d</sup> See *post*, ch. 22; and *ante*, ch. 7.

<sup>e</sup> 1 Cru. Dig. 56.

<sup>f</sup> Litt. s. 1.

<sup>g</sup> See pp. 47, 49.

<sup>h</sup> Of feuds, c. 1.

lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *propriety* of the soil always remaining in the lord. This allodial property no subject in England has;<sup>a</sup> it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium*;<sup>i</sup> but all subjects' lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs, which were laid upon the first feudatory when it was originally granted. A subject, therefore, hath only the usufruct, and not the absolute property of the soil: or as Sir Edward Coke expresses it,<sup>k</sup> he hath *dominium utile*, but not *dominium directum*. And hence it is that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have, by the words, "he is seised thereof in his *demesne, as of fee*." It is a man's *demesne, dominicum* or property, since it belongs to him and his heirs for ever; yet this *dominicum*, property or *demesne*, is strictly not absolute or allodial, but qualified or feudal; it is his *demesne, as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes<sup>l</sup>) the doctrine, that "all lands are holden;" having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this, its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee* therefore, in general signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud; and, when the term is used simply, without any other adjunct,

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Fee-simple.

<sup>a</sup> Co. Litt. 1 b.

*Deus. Ibid.*

<sup>i</sup> *Prædium domini regis est directum dominium, cujus nullus est author nisi*

<sup>k</sup> Co. Litt. 1 b.

<sup>l</sup> Of Ten. 148.

or has the adjunct of *simple* annexed to it, (as a fee or a fee-simple,) it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man.<sup>m</sup>

Taking therefore *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal.<sup>n</sup> But there is this distinction between the two species of hereditaments; that of corporeal inheritance a man shall be said to be seised *in his demesne, as of fee*; of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne.<sup>o</sup> For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses,<sup>p</sup> their owner hath no property, *dominium*, or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitudes*, or services, of the civil law.<sup>q</sup> The *dominium* or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee*.

Where it resides.

The fee simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee has been said to be in *abeyance*, that is, (as the word signifies) in expectation, remembrance, and contemplation in law; there

But is sometimes said to be in abeyance.

<sup>m</sup> Co. Litt. 1 b.

<sup>n</sup> *Feodum est quod quis tenet sibi et hæredibus suis, sive sit tenementum, sive redditus, &c.* Flet. l. 5, c. 5, s. 7.

<sup>o</sup> Litt. s. 10.

<sup>p</sup> See page 18.

<sup>q</sup> *Servitus est jus, quo res mea alterius rei vel personæ servit.* Ff. 8. l. 1.

being no person in *esse*, in whom it can vest and abide : though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis* : it is said therefore by some to remain in waiting or abeyance, during the life of Richard.<sup>r</sup> This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance.<sup>s</sup> And not only the fee, but the freehold also may be in abeyance ; as, when a parson dies, the freehold of his glebe is in abeyance ; until a successor be named, and then it vests in the successor.<sup>t</sup>

But this doctrine of abeyance, in the first case mentioned, is now very generally exploded. The better opinion on the point is that of Mr. Fearne, who thinks that the inheritance is not in abeyance, but that it remains, with the grantor or his heirs, *until* the contingency happens ;<sup>u</sup> and Mr. Christian contends further, that in the case of the parson the freehold is in his successor. It is to be observed, however, that the opinion of Blackstone on the point, besides its own weight, is in accordance with almost all the older authorities.

The word "heirs," is necessary in the grant or donation, in order to make a fee or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life.<sup>v</sup> This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness : by which we may remember<sup>w</sup> it was required that the form of the donation should be punctually pursued ; or that, as Cragg<sup>y</sup> expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expressit.*" And therefore, as the personal abilities of the donee were

Doctrine of  
abeyance ex-  
ploded.

What words  
necessary to  
the grant of  
a fee.

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<sup>r</sup> Co. Litt. 342 b.

<sup>s</sup> Litt. s. 646.

<sup>t</sup> Litt. s. 647.

<sup>u</sup> Fearne, Cont. Rem. 360, 7th ed.

<sup>v</sup> Litt. s. 1.

<sup>w</sup> See page 58.

<sup>y</sup> L. 1, t. 9, s. 17.

originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions.

Exceptions  
to the rule.

For, 1: It does not extend to devises by will; in which, as they were introduced at the time when the feudal rigour was apace wearing out, a more liberal construction is allowed; and therefore by a devise to a man for ever; or to one and his assigns for ever, or to one in fee simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words for perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise were to a man and his assigns, without annexing words of perpetuity, there the devisee took, until very recently, only an estate for life; for it did not appear that the devisor intended any more; although if this appeared in another part of the will, it would have been otherwise. But this has been altered by the late Wills Act,<sup>a</sup> which enacts, that when any real estate shall be devised without words of limitation, it shall be construed to pass the whole interest which the testator had power to dispose of, unless the contrary intention should appear by the will. 2. Neither does this rule extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passed by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other modes of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed.<sup>a</sup> 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation unless it be otherwise specially provided; but in creations by patents, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance.<sup>b</sup> 4. In grants of lands to sole corporations and

<sup>a</sup> 1 Vict. c. 26, s. 28, as to which see *post*, ch. xxiv.

<sup>a</sup> Co. Litt. 9. See *post*, ch. xxiii.

<sup>b</sup> *Ibid.* 9.



their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*; the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini*; and in all these cases a fee-simple vests in such sole corporation. But in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted; for albeit such simple grant be strictly only an estate for life, yet as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one.<sup>b</sup> 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies.<sup>c</sup> But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications of any sort. And these we may divide into two sorts; 1. *Qualified*, or *base* fees; and 2. Fees *conditional*, so called at the common law; and afterwards fees-*tail*, in consequence of the statute *de donis*.

II. Limited fees, which are.

1. A *Base*, or *qualified* fee, is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to *A.* and his heirs, *tenants of the manor of Dale*; in this instance whenever the heirs of *A.* cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity,<sup>d</sup> and, the instant he or his heirs quitted the

<sup>b</sup> Rights of Persons, [484.]

<sup>d</sup> Co. Litt. 27.

<sup>c</sup> *Ibid.* [249.]

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seignory of this manor the dignity was at an end. This estate is a fee, because by possibility it may endure for ever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee; but the owner has the same rights as tenant in fee, while his estate lasts.<sup>c</sup> But the term base fee is now more usually applied to that estate which is created by a tenant in tail attempting to convey a fee simple by lease and release, or other innocent<sup>f</sup> conveyance, as it is called. And it has been recently enacted, that where an estate tail shall have been barred, and converted into a base fee, such base fee may be enlarged into an estate in fee-simple.<sup>g</sup>

2. Condition-  
al fees.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata, sicut certis hæredibus, quibusdam a successione exclusis*:" as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs: or, to the heirs male of his body, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land shall revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor.<sup>h</sup> Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws.<sup>k</sup>

<sup>c</sup> 1 Cru. Dig. 79.

<sup>f</sup> See further as to this, *post*, ch. 22.

<sup>g</sup> 8 & 4 W. 4, c. 74, As to this statute, see *post*, ch. 23.

<sup>h</sup> Flet. 1. 3, c. 3, s. 5.

<sup>i</sup> Plowd. 241.

<sup>k</sup> *Si quis terram hæreditariam hæbeat,*

*quam parentes ejus ipsi reliquerunt, tunc statuimus, ut eam non vendat a cognatis hæredibus suis, si adsit scriptura vel testis quod illi viro prohibitum sit, qui eam ab initio acquisivit, et illi qui eam vendidit ut ita facere nequeat. LL. Aelfred, c. 37.*

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute, and wholly unconditional. So [ 111 ] that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion.<sup>1</sup> 2. To subject him to forfeit it for treason: which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated.<sup>m</sup> 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue.<sup>n</sup> And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by his performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs of *his body*, and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the

<sup>1</sup> Co. Litt. 19; 2 Inst. 333.<sup>n</sup> Co. Litt. 19.<sup>m</sup> Co. Litt. *Ibid.*; 2 Inst. 334.

lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees; which things, says Sir Edward Coke,<sup>o</sup> though they seem ancient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities and such like inheritances as are not within the statutes of entail, and

[ 112 ] therefore remain as at the common law.

The inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of contruction, (for such it undoubtedly was,) in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second,<sup>p</sup> (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*,<sup>q</sup> and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant

Statute *de donis*.

Origin of fee tail.

<sup>o</sup> 1 Inst. 19.

<sup>p</sup> 13 Edw. 1, c. 1.

<sup>q</sup> The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists (see Crag. l. 1, t. 10, s. 24, 25); among whom it signified any mutilated

or truncated inheritance, from which the heirs general were *cut off*; being derived from the barbarous verb *taliare*, to cut; from which the French *tailler*, and the Italian *tagliare*, are formed. (Spelm. Glo. 531.)

estate is what we now call a reversion.<sup>r</sup> And hence it is that Littleton tells us,<sup>s</sup> that tenant in fee-tail is by virtue of the statute of Westminster the Second.

Having thus shown the *original* of estates tail, I now proceed to consider, *what things* may, or may not, be entailed under the statute *de donis*. *Tenements*, is the only word used in the statute; and this Sir Edward Coke<sup>t</sup> expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed.<sup>u</sup> But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels: nor annuity, which charges only the person and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner.<sup>v</sup> An estate to a man and his heirs for another's life cannot be entailed;<sup>x</sup> for this is strictly no estate of inheritance, (as will appear hereafter,) and therefore not within the statute *de donis*. But though not strictly entailable under the statute, yet there are frequently limitations of such an estate to a man and the heirs of his body; and this *quasi* entail may be barred by any ordinary mode of alienation, as lease and release, bargain and sale, grant, surrender, or in equity by articles.<sup>y</sup> Neither can a copyhold estate be entailed by virtue of the *statute*; for that would tend to encroach upon and restrain the will of the lord; but by the *special custom* of the manor, a copyhold may be limited to the heirs of the body;<sup>z</sup> for here the custom ascertains and interprets the lord's will.

[ 113 ]  
What may  
be entailed.

<sup>r</sup> 2 Inst. 335.

<sup>s</sup> Sec. 13.

<sup>t</sup> Inst. 19, 20.

<sup>u</sup> 7 Rep. 33.

<sup>v</sup> Co. Litt. 19, 20.

<sup>x</sup> 2 Vern. 225.

<sup>y</sup> 1 Atk. 523; 2 Vern. 225; 1 Bro. C. C. 457.

<sup>z</sup> 3 Rep. 8.

Different  
species of  
estates tail.

Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail *per formam doni*.<sup>a</sup> Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways.<sup>b</sup>

[ 114 ] I shall instance only one; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten*: here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee; but they being heirs *to be by him begotten*, this makes it a fee-tail; and the person being also limited to whom such heirs shall be begotten, (*viz. Mary his present wife*,) this makes it a fee-tail special.

Tail male  
and female.

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails: for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail male general; but if to a man and the *heirs female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor *e converso*, the heirs male, in case of a gift in tail female.<sup>c</sup> Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heir male.<sup>d</sup> And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And there-

<sup>a</sup> Litt. s. 14, 15.

<sup>b</sup> Litt. s. 16, 26, 27, 28, 29.

<sup>c</sup> Litt. s. 21, 22.

<sup>d</sup> *Ibid.* s. 24.

fore if a man hath two estates-tail, the one in tail male, the other in tail female ; and he hath issue a daughter, which daughter hath issue a son ; this grandson can succeed to neither of the estates : for he cannot convey his descent wholly either in the male or female line.\*

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring* ; all these are only estates for life, there wanting the words of inheritance, his heirs.<sup>f</sup> So, on the other hand, a gift to a man and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail ; for there are no words to ascertain the body out of which they shall issue.<sup>g</sup> But, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male* ; or by other irregular modes of expression.<sup>h</sup>

What words necessary to create an estate tail.

[ 115 ]

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law ; which are estates *in libro maritagio*, or *frankmarriage*. These are defined<sup>i</sup> to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now, by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten ; that is, they are tenants in special tail. For this one word *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance ; supplying not only words of descent, but of procreation also. Such donees in

Frank-marriage.

\* Co. Litt. 25.

<sup>f</sup> Co. Litt. 20.

<sup>g</sup> Litt. s. 31 ; Co. Litt. 7 a.

<sup>h</sup> Co. Litt. 9 b, 27 a.

<sup>i</sup> Litt. s. 17.

frankmarriage are liable to no service but fealty ; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee.<sup>k</sup>

Incidents to  
estates tail.

[ 116 ]

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these.<sup>l</sup> 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail ; and 4, until very recently, that an estate-tail might be *barred*, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir ; but it may now be *barred* by a deed enrolled in the Court of Chancery. All which will hereafter be explained at large.

Their his-  
tory.

Thus much for the nature of estates-tail : the establishment of which family law, (as it is properly styled by Pigott<sup>m</sup>) occasioned infinite difficulties and disputes.<sup>n</sup> Children grew disobedient when they knew they could not be set aside : farmers were ousted of their leases made by tenants in tail ; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited : creditors were defrauded of their debts ; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth : innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought ; of suits in consequence of which our ancient books are full : and treasons were encouraged ; as estates-tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law ; and almost universally considered as the common grievance of the realm.<sup>o</sup> But as the nobility were always fond of

<sup>k</sup> Litt. c. 19, 20.

<sup>l</sup> Co. Litt. 224.

<sup>m</sup> Com. Recov. 5.

<sup>n</sup> 1 Rep. 131.

<sup>o</sup> Co. Litt. 19 ; Moor. 156 ; 10 Rep. 38.



this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the contrivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edw. IV.: which were then openly declared by the judges to be a sufficient bar of an estate-tail.<sup>p</sup> For though the courts [ 117 ] had, so long before as the reign of Edward III., very frequently hinted their opinion that a bar might be effected upon these principles,<sup>q</sup> yet it never was carried into execution: till Edward IV. observing <sup>r</sup> (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof, and of the remainders or reversions limited thereon, and create in lieu thereof any estate that the tenant in tail might please. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present I shall only say, that they, as well as fines, to be hereafter mentioned, were fictitious proceedings, introduced by a kind of *pia fraud*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and, that these recoveries, however clandestinely introduced, became by long use and acquiescence a most common assurance of lands; and were looked upon as the legal mode of conveyance, by which tenant in tail might dispose of his

Recoveries.

<sup>p</sup> 1 Rep. 131; 6 Rep. 40.

<sup>q</sup> 10 Rep. 37, 38.

<sup>r</sup> Pigot, 8.

<sup>s</sup> Year Book. 12 Edw. 4, 14, 19;

Fitzh. Abr. tit. *faux recov.*; 20 Bro.

Abr. *Ibid.* 30; tit. *recov. in value*, 19;

tit. *taille*, 36.

lands and tenements; so that no court would suffer them to be shaken or reflected on, and acts of parliament afterwards countenanced and established their effect and operation.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently resettled in a similar manner to suit the convenience of families, had address enough to procure a statute,<sup>u</sup> whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

To be forfeited for treason.

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Leases.

Fines.

The next attack which they suffered in order of time, was by the statute 32 Hen. VIII. c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail.<sup>v</sup> But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines<sup>x</sup> by the statute 32 Hen. VIII. c. 36, which declares a fine, duly levied by tenant in tail, to be a complete bar to him and his heirs, and all other persons, claiming under such entail. This was evidently agreeable to the intention of Henry VII., whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates,

<sup>u</sup> 11 Hen. 7, c. 20; 7 Hen. 8, c. 4; 34 & 35 Hen. 8, c. 20; 14 Eliz. c. 8; 4 & 5 Ann, c. 16; 14 G. 2, c. 20; 8 & 4 W. 4, c. 74.

<sup>v</sup> 26 Hen. 8, c. 13.

<sup>w</sup> See also 3 & 4 W. 4, c. 74, s. 41.

<sup>x</sup> 4 Hen. 7, c. 24.

yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared that they should *not* be a bar to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20, which enacts that no feigned recovery had against tenants in tail, where the estate was created by the crown,<sup>7</sup> and the remainder or reversion continues still in the crown, shall be of any [ 119 ] force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

Further, by a statute of the succeeding year,<sup>8</sup> all estates-tail were rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws,<sup>9</sup> they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4, an appointment<sup>b</sup> by tenant in tail of the lands entailed to a charitable use is good, without fine or recovery.

The most effectual blow, however, to estates-tail was struck by stat. 3 & 4 W. IV. c. 74, by which, s. 2, fines and recoveries are abolished; and by s. 14, all warranties of lands entered into by tenants in tail, are absolutely void against the issue in tail. Estates-tail cannot now therefore be barred, either by fines or recoveries, or by lineal warranty; but they may be barred by virtue of a much more simple assurance, a deed enrolled under the act, (s. 15),<sup>c</sup> as will be more fully explained in a subsequent part of this work.

But notwithstanding all these statutes, estates-tail were

<sup>7</sup> Co. Litt. 372.

<sup>8</sup> 33 Hen. 8, c. 39, s. 75.

<sup>a</sup> Stat. 21 Jac. 1, c. 19; 3 & 4 W. 4, c. 74, ss. 55—69.

<sup>b</sup> 2 Vern. 453; Cha. Prec. 16.

<sup>c</sup> Some special estates tail are excepted from the operation of the act. See ss. 16 & 18, and c. 23.

Fines and recoveries abolished.

exempted from ordinary debts. But this remaining privilege was taken away by stat. 1 & 2 Vict. c. 110, s. 13, which enacts that a judgment duly<sup>d</sup> entered up in any of the superior courts at Westminster, against any person, shall operate as a charge on all his real estate, and shall be binding on the issue of his body, and all other persons whom he might have barred, and by s. 18, decrees and orders of courts of equity shall have the effect of judgments.

Powers of tenant in tail.

Thus, at their first existence, estates tail could not be aliened at all, but by degrees they became unfettered; and now, as we shall see more fully hereafter, the tenant in tail is enabled to aliene his lands and tenements by deed founded on the late statute,<sup>e</sup> either absolutely or by way of mortgage, and thereby to defeat the interest as well of his own issue, though unborn, as also of the remainder man or reversioner, even where the reversion is vested in the crown<sup>f</sup> (except the estate tail be granted for public services, or the tenant in tail is expressly restrained by act of parliament from barring his estate:<sup>g</sup>) secondly, he is now liable to forfeit them for high treason and on bankruptcy; thirdly, he may charge them with reasonable leases; and lastly, they are now liable to the payment of his debts on a judgment or decree obtained against him.

<sup>d</sup> As to the due entering up of judgment, see Private Wrongs, ch. 25.

<sup>e</sup> 3 & 4 W. 4, c. 74.

<sup>f</sup> *Ibid.* s. 15 & 21.

<sup>g</sup> *Ibid.* s. 18; 34 & 35 Hen. 8, c. 20; and *post*, chap. 23.

## CHAPTER THE NINTH.

[ 120 ]

## OF FREEHOLDS NOT OF INHERITANCE.

WE are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the acts of the parties; others merely *legal*, or created by construction and operation of law.<sup>a</sup> We will consider them both in their order.

Estates for life are conventional or legal.

1. Estates for life, expressly created by deed or grant, (which alone are properly conventional) as where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur auter vie*.<sup>b</sup> These estates for life are, like inheritances, of a feudal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen,<sup>c</sup>) was not in its original hereditary. They are given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

1. Estates for life created by grant.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to *A. B.* the manor of Dale, this makes him tenant for life.<sup>d</sup> For though, as there are no words of inherit-

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What words will create an estate for life.

<sup>a</sup> Wright, 190.

<sup>b</sup> Litt. a. 56.

<sup>c</sup> Page 57.

<sup>d</sup> Co. Litt. 42 a.

ance, or *heirs*, mentioned in the grant, it cannot be construed to be a fee; it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of *the grantee*;<sup>\*</sup> in case the grantor hath authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor,<sup>f</sup> unless in the case of the King.

Estates for life granted on a contingency.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he is promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone.<sup>g</sup> Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law:<sup>h</sup> for which reason in conveyances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death.<sup>i</sup>

Incidents to an estate for life.

The *incidents* to an estate for life, are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed, [ 122 ] but also to those which are created by act and operation of law.

1. He may take estovers, or botes, &c.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land

<sup>\*</sup> Co. Litt. 42 a.

<sup>g</sup> Co. Litt. 42; 3 Rep. 20.

<sup>f</sup> *Ibid.* 36 a.

<sup>h</sup> 9 Rep. 48.

<sup>i</sup> Rights of Persons, [132].

demised to him reasonable *estovers*\* or *botes*.<sup>1</sup> For he hath a right to the full enjoyment and use of the land, and all its profits during his estate therein. But he is not permitted to cut down timber, except for necessary repairs, or to do other waste upon the premises:<sup>m</sup> (unless the estate be limited without impeachment of waste :) for the destruction of such things, as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance. It may here be noticed that by stat. 3 and 4 Vict. c. 55, a tenant for life is enabled to incur any proper expenses for draining his lands, and to charge the same thereon.

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain.<sup>n</sup>

<sup>2.</sup> Entitled to the emblements, when.

Therefore if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop; for the estate was determined *by the act of God*; and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives therefore of the tenant for life shall have the emblements, to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord who was entitled to the reversion, was also entitled to the profits of the whole year, but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole.<sup>o</sup> From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn is

[ 123 ]

\* See page 34.

<sup>m</sup> Co. Litt. 53.

<sup>1</sup> Co. Litt. 41.

<sup>n</sup> *Ibid.* 55.

<sup>o</sup> Feud. i. 2, t. 28.

sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life-estate be determined by the *act of law*. Therefore if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life,) and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law.<sup>p</sup> But if an estate for life be determined by the tenant's *own act*, (as by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry,) in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements.<sup>q</sup> The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth.<sup>r</sup> For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

Doctrine of  
emblements.

3. The lessees  
of tenants for  
life have the  
same privi-  
leges as the  
tenants  
themselves.

[ 124 ]

3. A third incident to estates for life relates to the under-tenants or lessees. For they have the same, nay, greater indulgencies than their lessors, the original tenants for life. The same, for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place:<sup>s</sup> and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee who is a third person. As in the case of

<sup>p</sup> 5 Rep. 116.

<sup>q</sup> Co. Litt. 55.

<sup>r</sup> Co. Litt. 55, 56; 1 Roll. Abr. 728.

<sup>s</sup> Co. Litt. 55.



a woman who holds *durante viduitate*: her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her.<sup>1</sup> The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors, the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to any body for the occupation of the land since the last quarter-day, or other day assigned for payment of rent.<sup>2</sup> To remedy which it is now enacted,<sup>3</sup> that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor.

It was doubted whether the statute of George the Second applied strictly to tenants for life, or whether persons who were exposed to a similar hardship could claim the benefit of it. Thus it was frequently questioned whether the statute extended to tenants in tail,<sup>4</sup> after possibility of issue extinct. These doubts are now set at rest by the statute already noticed,<sup>5</sup> 4 W. IV., c. 22, s. 1,<sup>6</sup> which, after reciting that doubts have been entertained whether the provisions of the statute of George the Second apply to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, enacts that rents reserved on leases which shall determine on the death of the person making them, shall be considered to be within the meaning of that act, although such person was not strictly tenant for life.

II. The next estate for life is of the legal kind, as contradistinguished from conventional; viz. that of tenant *in tail after possibility of issue extinct*. This happens where one is tenant in special tail, and a person from whose body the issue was to spring, dies without issue; or having left issue, that issue becomes extinct: in either of these cases

II. Tenant in tail, after possibility of issue extinct.

<sup>1</sup> Cro. Eliz. 461; 1 Roll. Abr. 727.

Swanst. 694; *Vernon v. Vernon*, 2

<sup>2</sup> 10 Rep. 127.

B. C. C. 659.

<sup>3</sup> Stat. 11 G. 2, c. 19, s. 15.

<sup>4</sup> See *ante*, pp. 42 & 44.

<sup>5</sup> *Paget v. Gos*, Amb. 198; 3

[ 125 ] the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue:<sup>a</sup> in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely tenant in fee-tail special, that would not have distinguished him from others; and besides he has no longer an estate of inheritance, or fee,<sup>a</sup> for he can have no heirs, capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

How this estate is created.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *à vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them.<sup>b</sup> A possibility of issue is always supposed to exist in law; unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.<sup>c</sup>

Incidents of this estate.

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable

<sup>a</sup> Litt. s. 32.

<sup>a</sup> 1 Roll. Rep. 184; 11 Rep. 80.

<sup>b</sup> Co. Litt. 28.

<sup>c</sup> Litt. s. 34; Co. Litt. 28 a.

for waste, &c.:<sup>d</sup> (although he will be restrained, as any other tenant for life, by a court of equity from malicious waste;\*) or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate if he alienes it in fee-simple:<sup>f</sup> whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner; who is not concerned in interest, till all possibility of issue be extinct. Further, this estate is not privileged from merger as an estate-tail is.<sup>g</sup> But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature. [ 126 ]

III. An estate *by the curtesy of England*, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.<sup>h</sup> III. Tenant by the curtesy.

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the Mirror<sup>i</sup> to have been introduced by king Henry the First; but it appears also to have been the established law of Scotland, wherein it was called *curialitas*,<sup>k</sup> so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's court or *curtis*, (that is, being his vassal or tenant) than to denote any peculiar favour belonging to this island. And therefore it is laid down<sup>l</sup> that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone; whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of king Henry III.<sup>m</sup> It also appears<sup>n</sup> to have

<sup>d</sup> Co. Litt. 27 b.

<sup>e</sup> Co. Litt. 28 a; *Williams v. Williams*, 15 Ves. 427.

<sup>f</sup> Co. Litt. 28.

<sup>g</sup> 3 Prest. Conv. 263.

<sup>h</sup> Litt. s. 35, 52. As to curtesy in gavelkind see, *post*, p. 147.

<sup>i</sup> C. 1. s. 3.

<sup>k</sup> Crag l. 2, t. 19, s. 4. But see Co. Litt. by Harg. 80 a, n. 5.

<sup>l</sup> Litt. s. 90; Co. Litt. 30, 67.

<sup>m</sup> Pat. 11 Hen. 3, m. 30, in 2 Bac. Abr. 659.

<sup>n</sup> *Grand Coustum.* c. 119.

obtained in Normandy; and was likewise used among the ancient Almans or Germans.<sup>o</sup> And yet it is not generally apprehended to have been a consequence of feudal tenure,<sup>p</sup> though I think some substantial feudal reasons may be given for its introduction. For, if a woman seised of lands had issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to

[ 127 ] maintain it; for which reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant.<sup>q</sup> As soon therefore as any child was born, the father began to have a permanent interest in the lands: he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

Requisites to  
this estate.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife.<sup>r</sup> 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But it should be observed that entry is not always necessary to an actual seisin, or seisin in deed; for if the land be in lease for years, curtesy may be without entry, or even receipt of rent;<sup>s</sup> and courts of equity allow curtesy of trust estates, which, though mere *rights* in law, are estates in equity.<sup>t</sup> And of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife: as in case of an advowson, where the church has not become void in the life-time of the wife; which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem*.<sup>u</sup> If the wife be an

<sup>o</sup> Lindenbrog. *LL. Alman.* t. 92.

<sup>p</sup> Wright, 194.

<sup>q</sup> F. N. B. 148.

<sup>r</sup> Co. Litt. 30.

<sup>s</sup> Co. Litt. 29 a, n. 8; Hargr. note 162; 3 Atk. 469.

<sup>t</sup> 1 Atk. 608. See *ante*, p. 119.

<sup>u</sup> *Ibid.* 29.

idiot, the husband shall not be tenant by the curtesy of her lands, for the king by prerogative is entitled to them the instant she herself has any title; and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy.<sup>v</sup> 3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the *strongest* evidence of its being born alive; but it is not the *only* evidence.<sup>x</sup> The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy: because, at the instant of the mother's death, he was [ 128 ] clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him.<sup>y</sup> In gavelkind lands a husband may be tenant by the curtesy without having any issue.<sup>z</sup> But in general there must be issue born, and such issue as is also capable of inheriting the mother's estate.<sup>a</sup> Therefore if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail *male*.<sup>b</sup> And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised: because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the old rule of law, could be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore, as the husband had never begotten any issue that could be heir to those lands, he should not be tenant of them by the curtesy.<sup>c</sup> And hence we may observe, with how much nicety and consideration the old rules of law were framed;

<sup>v</sup> Co. Litt. 30; Flowd. 263. But as to the marriage of an idiot, see Rights of Persons, [438].

<sup>x</sup> Dyer, 25; 8 Rep. 34.

<sup>y</sup> Co. Litt. 29.

<sup>z</sup> Co. Litt. 30; and *ante*, p. 87.

<sup>a</sup> Litt. s. 52.

<sup>b</sup> Co. Litt. 29.

<sup>c</sup> Co. Litt. 40. But now see 3 & 4 W. 4, c. 106, s. 2, and *post*, ch. 16.

and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy.<sup>d</sup> The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate*,<sup>e</sup> and may do many acts to charge the lands: but his estate is not *consummate* till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.<sup>f</sup>

[ 129 ]

Tenant in  
dower.

IV. An estate in *dower* is where the husband of a woman is entitled to an estate of inheritance, and dies. In this case, the wife shall have the third part of all the lands and tenements whereof he was entitled at any time during the coverture, to hold to herself for the term of her natural life.<sup>g</sup>

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*: which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there any thing in general more different than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of king Edmond,<sup>h</sup> the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow

<sup>d</sup> Co. Litt. 29.<sup>e</sup> *Ibid.* 30.

<sup>f</sup> *Ibid.* The Real Property Commissioners in their first Report proposed to make some alterations in the law of curtesy, the principal of which were to abolish the rule that the issue must be born alive, and to restrict the estate to an undivided moiety of the lands; and a bill was brought in

in the Session of 1831, (printed in 2nd vol. of the Legal Observer, p. 310,) to carry these recommendations into effect. It was however suffered to drop, and it may therefore be considered that the law on this subject will not be unsettled.

<sup>g</sup> Litt. s. 36.<sup>h</sup> Wilk. 75.

became entitled to a conditional estate in one half of the lands; with a proviso that she remained chaste and unmarried;<sup>1</sup> as is usual also in copyhold dowers, or free bench. Yet some<sup>k</sup> have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia*,<sup>l</sup> and *dotalitium*) by the emperor Frederick the Second;<sup>m</sup> who was contemporary with our king Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals.<sup>n</sup> However this be, the reason, [ 130 ] which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children.<sup>o</sup>

In treating of this estate, let us, first, consider, *who* may be endowed; secondly, of *what* she may be endowed: thirdly, the manner *how* she may be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *à vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*.<sup>p</sup> But a divorce *à mensa et thoro* only doth not destroy the dower;<sup>q</sup> no, not even for adultery itself by the common law.<sup>r</sup> Yet now by the statute Westm. 2,<sup>s</sup> if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly

1. Who may be endowed.

<sup>1</sup> Somner. Gavelk. 51; Co. Litt. 33; Bro. Dower, 70.

<sup>k</sup> Wright, 192.

<sup>l</sup> Crag. l. 2, t. 22, s. 9.

<sup>m</sup> *Ibid.*

<sup>n</sup> Mod. Un. Hist. xxxii. 91.

<sup>o</sup> Bract. l. 2, c. 39; Co. Litt. 30.

<sup>p</sup> Bract. l. 2, c. 39, s. 4.

<sup>q</sup> Co. Litt. 33 a, 33 b.

<sup>r</sup> Yet among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri*. (Stiernh. l. 3, c. 2.)

<sup>s</sup> 13 Edw. 1, c. 34.

held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy: but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde,<sup>u</sup> that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton<sup>w</sup> gives it another turn; viz. that it is presumed that the wife was privy to her husband's crime. However, the statute 1 Edw. VI. c. 12, abated the rigour of the common law in [ 131 ] this particular, and allowed the wife her dower. But a subsequent statute<sup>x</sup> revived this severity against the widows of traitors, who are now barred of their dower, but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands.<sup>y</sup> The wife must be above nine years old at her husband's death, otherwise she shall not be endowed:<sup>a</sup> though in Bracton's time the age was indefinite, and dower was then only due *si uxor possit dotem promereri, et virum sustinere*.<sup>b</sup>

2. Of what a wife may be endowed.

Alterations made by the 3 & 4 W. IV. c. 105.

2. We are next to enquire, of what a wife may be endowed; and in this respect considerable alterations have been recently made in this estate by the stat. 3 & 4 W. IV. c. 105, which however does not extend to the dower of any widows who shall have been married on or before the 1st of January, 1834, or to any will, deed, contract, or engagement entered into or executed before that time.

<sup>u</sup> Co Litt. 31 a.

<sup>w</sup> P. C. b. 3, c. 3.

<sup>x</sup> C. 110.

<sup>y</sup> 5 & 6 Edw. 6, c. 11. In certain modern treasons relating to the coin dower was not barred. See Stat. 5 Eliz. c. 11; 18 Eliz. c. 1; 8 & 9 W. 3, c. 26; 15 & 16 G. 2, c. 28. These are now reduced to a felony, 2 W. 4, c. 24, and Public Wrongs. [91.]

<sup>f</sup> = Co. Litt. 31. But see Harg. n. 187, where it is said that by an act of Parliament not printed, Rot. Parl. 8 H. 5. n. 15, all women aliens, married to Englishmen by licence of the King, are enabled to demand their dower in the same manner as English women.

<sup>a</sup> Litt. s. 36; but Litt. queries it, s. 37.

<sup>b</sup> L. 2, c. 39, s. 3.



With respect therefore to such, the old law is still in force, which we shall proceed to state. A widow married before the 1st of January, 1834, is entitled to be endowed of all lands and tenements of which her husband was seised in fee-simple or fee-tail at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir.<sup>d</sup> Therefore, if a man, seised in fee-simple, had a son by his first wife, and after married a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue, that she could have, could by any possibility inherit them.<sup>e</sup> A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed.<sup>f</sup> The seisin of her husband, for a transitory instant only, [ 132 ] when the same act which gives him the estate conveys it also out of him again, (as where by a fine, land was granted to a man, and he immediately rendered it back by the same fine,) such a seisin will not entitle the wife to dower:<sup>g</sup> for the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof.<sup>h</sup> It was also well

<sup>d</sup> Litt. s. 36, 53.

<sup>e</sup> *Ibid.* s. 53.

<sup>f</sup> Co. Litt. 31.

<sup>g</sup> Cro. Jac. 615; 2 Rep. 67; Co. Litt. 31.

<sup>h</sup> This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in

one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivorship; in consequence of which seisin his widow had a verdict for her dower. Cro. Elis. 503.

established that a widow was not dowable of an equitable or trust estate, the meaning of which has been already explained.<sup>i</sup> But as to widows, married after the 1st of January, 1834, it is now different, for the legal seisin of the husband is no longer necessary, it being enacted, (s. 1,) that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled to dower out of the same land; and (s. 2) that when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

Another difference is introduced by the recent statute; for with respect to widows married on or before the 1st of January 1834, it matters not, as Blackstone has remarked,<sup>k</sup> though the husband aliene the lands during the coverture, for he alienes them liable to dower; but as to widows married after that time, it is provided (s. 3) that they shall not be entitled to dower out of any land which shall have been absolutely disposed of by their husbands in their lifetime, or by their wills. However, no woman, whether married before or after that time, shall be endowed of a castle built for defence of the realm, nor of a common without stint,<sup>l</sup> for as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked.<sup>m</sup> The dower of the wife as to copyholds, called her freebench, depends entirely on the custom of the manor; it is sometimes one-half, sometimes one-third, and often

<sup>i</sup> See *ante*, p. [119.]

<sup>k</sup> Page 132, citing Co. Litt. 32.

<sup>l</sup> Co. Litt. 31; 3 Lev. 401.

<sup>m</sup> Co. Litt. 32; 1 Jon. 315.

times exists not at all; nor is any widow dowable of estates which her husband holds with others in joint tenancy, but she is of estates held in coparcenary, or in common.<sup>n</sup>

3. Next, as to the manner in which a woman is to be endowed. There were until very recently four species of dower; the fifth, mentioned by Littleton,<sup>o</sup> *de la plus belle*, having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the *common law*; or that which is before described. 2. Dower by particular *custom*;<sup>p</sup> as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiæ*;<sup>q</sup> which is where tenant in fee simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke in his translation of Littleton adds) troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same: on which the wife, after her husband's death, may enter without farther ceremony. 4. Dower *ex assensu patris*;<sup>r</sup> which is only a species of dower *ad ostium ecclesiæ*, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) have been made<sup>s</sup> *in facie ecclesiæ et ad ostium ecclesiæ*; *non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia*. [ 133 ]

3. The manner in which a woman is endowed.

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before-mentioned; *viz.* a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition, of widowhood and chastity, was only required in case the husband left any issue:<sup>t</sup> and afterwards

<sup>n</sup> 1 Com. Dig. 172, 173.

<sup>o</sup> Sec. 48, 49.

<sup>p</sup> Litt. s. 37.

<sup>q</sup> *Ibid.* s. 39.

<sup>r</sup> Litt. s. 40.

<sup>s</sup> Bracton, l. 2, c. 49, s. 4.

<sup>t</sup> *Si mortuo viro uxor ejus remanserit et sine liberis fuerit, dotem suam*

we hear no more of it. Under Henry the Second, according to Glanvil,<sup>a</sup> the dower *ad ostium ecclesiæ* was the most usual species of dower: and here, as well as in Normandy,<sup>v</sup> it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feudal rigor, was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he then was seised, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits.<sup>z</sup>

[ 134 ] But if no specific dotation was made at the church porch, then she was endowed by the common law of the third part (which was called her *dos rationabilis*) of such lands and tenements, as the husband was seised of at the time of the espousals, and no other; unless he especially engaged before the priest to endow her of his future acquisitions:<sup>y</sup> and if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower<sup>a</sup> in lands which he afterwards acquired.<sup>a</sup> In king John's *magna carta*, and the first

*habebit;—si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.* (Cart. Hen. 1, A. D. 1101; Introd. to Great Charter, edit. Oxon, page iv.)

<sup>a</sup> L. 6, c. 1 & 2.

<sup>v</sup> *Gr. Coutum.* c. 101.

<sup>z</sup> Bract. l. 2, c. 89, s. 6.

<sup>y</sup> *De questu suo.* (Glan. *Ib.*)—*de terris acquisitis et acquirendis.* (Bract. *Ib.*)

<sup>a</sup> Glan. c. 2.

<sup>a</sup> When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotat eam de tali manerio cum pertinentiis, &c.* Bract. *Ibid.*) and therefore in the old York ritual (Seld. *Ux. Hæb.* l. 2, c. 27,) there is, at this part of the matrimonial service, the following rubric; “*sacerdos interroget dotem mulieris; et si terra ei in dotem detur, tunc dicatur psalmus iste,*

*&c.*” When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis*, Bract. *Ibid.*) the husband seems to have said, “with all my lands and tenements I thee endow;” and then they all became liable to her dower. When he endowed her with personalty only, he used to say, “with all my worldly goods (or, as the Salisbury ritual has it, *with all my worldly chattel*) I thee endow;” which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by *magna carta*, cap. 28, and will be farther treated of in the concluding chapter of this volume; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

charter of Henry III,<sup>b</sup> no mention is made of any alteration of the common law, in respect of the lands subject to dower; but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband has held in his life-time:<sup>c</sup> yet, in case of a specific endowment of less *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III. and Edward I.<sup>d</sup> In Henry IV.'s time it was denied to be law, that a woman can be endowed of her husband's goods and chattels:<sup>e</sup> and, under Edward IV., Littleton lays it down expressly, that a woman may be endowed *ad ostium ecclesiæ* with [ 135 ] more than a third part;<sup>f</sup> and shall have her election, after her husband's death, to accept such dower or refuse it and betake herself to her dower at common law.<sup>g</sup>

But the dowers *ad ostium ecclesiæ* and *ex assensu patris*, have long since fallen into total disuse, and were lately abolished by the 3 & 4 W. IV., c. 105, s. 13.

I proceed, therefore, to consider the method of endowment, or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord: neither could she marry again without his licence; lest she should contract herself, and so convey part of the feud to the lord's enemy.<sup>h</sup> This licence the lords took care to be well paid for: and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first by the charter of Henry I.,<sup>i</sup> and afterwards by *magna carta*,<sup>k</sup> that the widow shall not be distreined to marry afresh,<sup>l</sup> if she chooses

Mode of  
assigning  
dower at the  
common law.

<sup>b</sup> A. D. 1216, c. 7, edit. Oxon.

<sup>c</sup> *Assignatur autem ei pro dote sua tertia pars totius terræ mariti sui quæ sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiæ.* c. 7. (*Ibid.*)

<sup>d</sup> Bract. *ubi supra*; Britton, c. 101, 102; Flet. l. 5, c. 23, s. 11, 12.

<sup>e</sup> P. 7 Hen. 4, 13, 14.

<sup>f</sup> Sec. 39, F. N. B. 150.

<sup>g</sup> Sec 41.

<sup>h</sup> Mirr. c. 1, s. 3.

<sup>i</sup> *Ubi supra.*

<sup>k</sup> c. 7.

<sup>l</sup> According to Blackstone's construction of this statute, she should pay nothing for her marriage, but this seems incorrect. See Mr. J. Coleridge's note (15).

Her quarantine, what it is.

[ 136 ]

to live without a husband; but shall not however marry against the consent of the lord; and farther, that nothing shall be taken for assignment of the widow's dower. By the charter of Henry I., and afterwards by *magna charta*, it is provided that the widow shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarantine*; a term made use of in law to signify the number of forty days, whether applied to this occasion or any other.<sup>m</sup> The particular lands, to be held in dower, must be assigned<sup>n</sup> by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under-tenancy, completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign over dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it;<sup>o</sup> or by bill in equity, which is now the more usual remedy. Or if the heir (being under age) or his guardian assign more than she ought to have, it might have been afterwards remedied by writ of *admeasurement* of dower.<sup>p</sup> If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds: but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.<sup>q</sup> By a very late act<sup>r</sup> almost all real and mixed actions were abolished

<sup>m</sup> It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.

<sup>n</sup> Co. Litt. 31, 35.

<sup>o</sup> Co. Litt. 84, 85.

<sup>p</sup> F. N. B. 148; Finch, L. 814; Stat. Westm. 2; 13 Edw. 1, c. 7.

<sup>q</sup> Co. Litt. 32.

<sup>r</sup> 3 & 4 W. 4, c. 27, s. 36.

from the 31st of December, 1834, but the writ of right of dower, and the writ of dower *unde nihil habet* are preserved.

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the common law diffusing itself so extensively, it was before the recent acts a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the ancient law respecting dower *ad ostium ecclesie*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly,

4. How dower may be *barred* or prevented. A widow <sup>4. How dower may be barred.</sup> may be barred of her dower not only by elopement, divorce, being an alien,<sup>4</sup> the treason of her husband, and other disabilities before-mentioned, but also by detaining the title deeds, or evidences of the estate from the heir, until she restores them:<sup>5</sup> and by the statute of Gloucester,<sup>6</sup> if the dowager alienes the land assigned her for dower she forfeits it *ipso facto*, and the heir may recover [ 137 ] it by action. A woman also might be barred of her dower by levying a fine, or suffering a recovery of the lands, during her coverture, when those fictitious assurances existed,<sup>7</sup> as she may still be by the deed substituted in their place. But the most usual methods of barring dowers are 1. by jointure, as regulated by the statute 27 Hen. III. c. 10; 2, by the act of the husband since the statute,<sup>8</sup> and 3. by limiting the lands liable to dower to such uses as prevent dower attaching.

And first as to jointures.—A jointure, which, strictly speaking, signifies a joint estate limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Ed. Coke;<sup>9</sup> “ a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband;” <sup>1st. By jointures,</sup> <sup>Definition of jointures.</sup>

<sup>4</sup> 3 & 4 W. 4, c. 105.

<sup>5</sup> But see *ante*, p. 150, n. z.

<sup>6</sup> Co. Litt. 39.

<sup>7</sup> 6 Edw. 1, c. 7.

<sup>8</sup> Pig. of Recov. 67. See *post*, c. 22.

<sup>9</sup> 3 & 4 W. 4, c. 105. <sup>1</sup> 1 Inst. 36.

for the life of the wife at least." This description is framed from the purview of the statute 27 Hen. VIII. c. 10, before-mentioned : commonly called the statute of *uses*, of which we have already spoken.<sup>a</sup> It is here only necessary to observe, that before the making of that statute, the greatest part of the land of England was conveyed to *uses* ; the property or possession of the soil being vested in one man, and the *use*, or profits thereof, in another ; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein ; he not being *seised* thereof : wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure ; which settlement would be a provision for the wife in case she survived her husband. At length the statute of *uses* ordained, that such as had the *use* of lands, should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal *seisin*, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure, had not the same statute provided, that upon the husband's making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower.<sup>b</sup> But then these four requisites must be punctually observed : 1. The jointure must be limited to<sup>c</sup> take effect immediately on the death of the husband. 2. It must be for her own life, or during widowhood<sup>d</sup> at least, and not *pur autre vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her ; although a trust estate is a good equitable jointure.<sup>e</sup> 4. It must be made in satisfaction of her whole dower, and not of any particular part of it ; and this should properly be ex-

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<sup>a</sup> See *ante*, ch. 7.<sup>b</sup> 4 Rep. 1, 2.<sup>c</sup> Mr. J. Coleridge's note.<sup>d</sup> 4 Rep. 3.<sup>e</sup> Harg. Co. Litt. 226.



pressed in the deed; but if not expressed, it seems that evidence will be let in to prove the fact.<sup>f</sup> If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law.

There are some advantages attending tenants in dower that do not extend to jointresses: and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the King's debtor, the king cannot distrein for his debt, if contracted during the coverture.<sup>g</sup> But, on the other hand, a widow may enter at once, without any formal process, on her jointure land: as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles; and the resemblance was still greater while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower.<sup>h</sup> And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.<sup>i</sup> Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiæ*, which he considered the most eligible species of any. [ 139 ]

2. We are next to consider the second mode of barring dower, *viz.* by the act of the husband, under the act 3 & 4 W. IV. c. 105. Before that act, the husband and wife, by levying a fine, or suffering a recovery, could bar the right of dower in the wife;<sup>k</sup> but by the late act the

<sup>g</sup> By virtue of 3 & 4 W. IV. c. 105.

<sup>f</sup> Co. Litt. 36 b; 4 Rep. 3; Owen, 33; Pres. Est. 599.

<sup>i</sup> *Ibid.* 37.

<sup>h</sup> Co. Litt. 31 a; F. N. B. 150.

<sup>k</sup> *Goodrick v. Sholtbott*, Prec. Cha. 333; 10 Co. 49 b.

<sup>j</sup> Co. Litt. 36.

power of the husband over the dower of the wife is greatly enlarged ; for it is enacted in the first place, (s. 5,) that all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his land shall be liable, shall be valid and effectual as against the right of his widow to dower. In the second place it is enacted, (s. 6,) that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, or by his will, (s. 7,) it shall be declared that his widow shall not be entitled to dower out of such land. So that by this act, the husband by any deed executed in his lifetime, or even by his will, may deprive his widow of all title to dower ; but it is to be borne in mind that this act only extends to the dower of widows married after the 1st of January 1834. The title to or estate in dower of widows married on or before that time could only be defeated by fine or recovery when those assurances existed, and since their abolition, can be barred by the deed substituted in their room, which will be more fully adverted to hereafter.

3. By uses to bar dower.

3. *By uses to bar dower.*—This power of the husband over his wife's dower would be more important if the right to dower were more extensive ; but, it has in fact been greatly diminished, first by jointures, and next by the almost universal practice, which has existed for the last fifty years, of conveying lands on a purchase, in such a manner that while the husband has complete power to dispose of the lands, the dower of the purchaser's widow cannot attach, or as it is generally called, *to uses to bar dower*,—an ingenious contrivance which is the third mode of defeating it, and more extensively resorted to than any, the most usual form of which is said to have been suggested by Mr. Fearne, to evade the claim of dower.<sup>1</sup>

<sup>1</sup> See *Duncombe v. Duncombe*, 3 Lev. 487 ; Fearne Cont. Rem. 347, 7th edit. ; 2 Sand. on Us. 321. The most usual form of these uses will be found in the Appendix No. I. p. i. & ii. and the student on attentively consider-

ing them and the rules laid down in this chapter, will see that if lands are so conveyed, dower cannot attach, and yet the husband will have full power to dispose of the lands. In the Appendix No. I. the purchaser is supposed to

And here it may occur to the reader that the sense of gallantry towards the softer sex, which Blackstone so repeatedly considers as conspicuous in the law of England, has not been particularly shown of late years with respect to these alterations in the law of dower; but it is to be remembered that the old law in this respect was first evaded, and then abolished as imposing an inconvenient and unnecessary restriction on the alienation and disposition of real property, which, it is to be presumed, was generally as injurious to the wife as to the husband, and because from the great increase of personal property it has been ordinarily found more suitable to make a provision for the wife from that source; and certainly there seems no reason to suppose that either the influence or the power of the female portion of Her Majesty's subjects are less exercised at the present time than at any former period of our history.

have been married on or before the 1st of January, 1834, in which case, in order to defeat the dower of his wife, the land should be conveyed to uses to bar dower. In No. II. the purchaser is supposed to be unmarried, or to have married after the 1st of January,

1834, when the declaration that dower shall not attach, p. vii., will be sufficient. Although, even in this case, it is not unusual in practice to convey lands to uses to bar dower, in order to save the necessity of proving the date of the marriage.

## CHAPTER THE TENTH.

## [ 140 ] OF ESTATES LESS THAN FREEHOLD.

Estates less  
than freehold  
of three sorts.

OF estates that are less than freehold, there are three sorts: 1. Estates for years: 2. Estates at will: 3. Estates by sufferance.

1. Estates  
for years.

An estate for *years* is a contract for the possession of lands or tenements, for some determinate period: and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee,<sup>a</sup> and the lessee enters thereon.<sup>b</sup> If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.<sup>c</sup> And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

Legal com-  
putation of  
time.

The space of a year is a determinate and well known period, consisting commonly of 365 days; for, though in bissextile or leap years it consists properly of 366, yet by the statute 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating

<sup>a</sup> We may here remark, once for all, that the terminations of "—or" and "—ee" obtain, in law, the one an active, and the other a passive signification; the former usually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee

is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. Litt. s. 57.

<sup>b</sup> *Ibid.* 58.

<sup>c</sup> *Ibid.* 67.

months; either as a lunar, consisting of twenty-eight [ 141 ] days, the supposed revolution of the moon, thirteen of which make a year; or, as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is, as a general rule, a lunar month, or twenty-eight days, unless otherwise expressed, or clearly to be intended; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelve month" in the singular number, it is good for the whole year.<sup>d</sup> For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes.<sup>e</sup> Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent History of estates for years. in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for [ 142 ] the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and

<sup>d</sup> 6 Rep. 61; *Lacon v. Cooper*, 2 & Bing. 186; S. C. 6 Moo. 483.  
<sup>e</sup> T. B. 224; *Cockell v. Gray*, 3 Brod. \* Co. Litt. 185.

his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold :<sup>f</sup> which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent : and indeed we are told<sup>g</sup> that by the ancient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated ; for we may observe in Madox's collection of Ancient Instruments, some leases for years of a pretty early date, which considerably exceed that period ;<sup>h</sup> and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III.<sup>i</sup> and probably of Edward I.<sup>k</sup> But certainly, when by the statute 21 Hen. VIII. c. 15, the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before ; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages : continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds as when they were little better than tenancies at the will of the landlord.

[ 143 ] Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is

How terms of years may be limited.

<sup>f</sup> Co. Litt. 46 a.

<sup>g</sup> Mirror, c. 2, s. 27 ; Co. Litt 45, 46.

<sup>h</sup> Madox *Formulare Anglican*, No. 289, fol. 140, Demise for Eighty Years, 21 Ric. 2 ; *Ibid.* No. 246, fol.

146, for the like term, A. D. 1429 ; *Ibid.* No. 248, fol. 148, for Fifty Years, 7 Edw. 4.

<sup>i</sup> 32 Ass. pl. 6 ; Bro. Abr. t. *Mortdauncestor*, 42 *Spoliation*, 6.

<sup>k</sup> Stat. of Mortmain, 7 Edw. 1.

hounded, limited, and determined : for every such estate must have a certain beginning, and certain end.<sup>1</sup> But *id certum est, quod certum reddi potest* : therefore if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years,<sup>m</sup> for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease.<sup>n</sup> A lease for so many years as J. S. shall live, is void from the beginning ;<sup>o</sup> for it is neither certain, nor can ever be reduced to a certainty during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale ; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good :<sup>p</sup> for there is a certain period fixed, beyond which it cannot last ; though it may determine sooner, on the death of J. S. or his ceasing to be parson there.

We have before remarked and endeavoured to assign the reason of the inferiority in which the law places an estate for years when compared with an estate for life or an inheritance : observing that an estate for life, even if it be *pur autre vie*, is a freehold ; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate.<sup>1</sup> Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good ; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can, at common law, commence *in futuro* ; because it cannot be created at common law without livery of seisin, or corporal possession of the land : and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter.<sup>r</sup> And, because no livery of seisin is necessary to a lease for years, such lessee is not

Terms for years inferior to estates of freehold.

[ 144 ]

No estate of freehold can at common law commence in future.

<sup>1</sup> Co. Litt. 45.

<sup>m</sup> 6 Rep. 35.

<sup>n</sup> Co. Litt. 46.

<sup>o</sup> Co. Litt. 45.

<sup>p</sup> *Ibid.*

<sup>q</sup> *Ibid.* 46.

<sup>r</sup> 5 Rep. 49. But see *post*.

Distinction  
between  
terms for  
years and  
freeholds, in  
this and  
other re-  
specta.

said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land but of the term of years;<sup>a</sup> the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to *A.* for the term of three years, and after the expiration of the said *term* to *B.*, for six years, and *A.* surrenders or forfeits his lease at the end of *one* year, *B.*'s interest shall immediately take effect; but if the remainder had been to *B.* from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case *B.*'s interest will not commence till the time is fully elapsed, whatever may become of *A.*'s term.<sup>c</sup>

Incidents to  
tenancy for  
years.

Tenant for term of years hath, incident to, and inseparable from, his estate, unless by special agreement, the same estovers, which we formerly observed<sup>d</sup> that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote:<sup>e</sup> terms which have been already explained.<sup>f</sup>

[ 145 ] With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it, except there be a custom to the contrary;<sup>g</sup> for the tenant knew the expiration of his term, and therefore it was his own folly to sow

Emble-  
ments.

<sup>a</sup> Co. Litt. 46.

<sup>c</sup> *Ibid.* 45.

<sup>d</sup> Page 140.

<sup>e</sup> Co. Litt. 45.

<sup>f</sup> Page 34.

<sup>g</sup> 1 Dougl. 201.



what he never could reap the profits of.<sup>a</sup> But where the lease for years depends upon an uncertainty; as, upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives: in all these cases, the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors, shall be entitled thereto.<sup>a</sup> Not so, if it determine by the act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default.<sup>b</sup>

II. The second species of estates not freehold, are *estates at will*. <sup>s. Estates at will.</sup> An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession.<sup>c</sup> Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connections with the other at his own pleasure.<sup>d</sup> Yet this must be understood with some restriction. For, if [ 146 ] the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits.<sup>e</sup> And this for the same reason, upon which all the cases of emblements turn; viz. the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant

<sup>a</sup> Litt. s. 68.<sup>b</sup> Co. Litt. 56.<sup>c</sup> *Ibid.* 55.<sup>d</sup> Litt. s. 68.<sup>e</sup> Co. Litt. 55.<sup>f</sup> *Ibid.* 56.

himself determines the will; for in this case the landlord shall have the profits of the land.<sup>f</sup>

What act determines a tenancy at will.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (beside the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land,<sup>g</sup> or notice must be given to the lessee<sup>h</sup>) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber,<sup>i</sup> taking a distress for rent and impounding it thereon,<sup>k</sup> or making a feoffment, or lease for years of the land to commence immediately;<sup>l</sup> any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure;<sup>m</sup> or, which is *instar omnium*, the death or outlavery of either lessor or lessee;<sup>n</sup> puts an end to or determines the estate at will.

[ 147 ]

The law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before mentioned: and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils.<sup>o</sup> And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year.<sup>p</sup> And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without

Tenant from year to year.

<sup>f</sup> Co. Litt. 55.

<sup>g</sup> *Ibid.*

<sup>h</sup> 1 Ventr. 248.

<sup>i</sup> Co. Litt. 55.

<sup>k</sup> *Ibid.* 57.

<sup>l</sup> 1 Roll. Abr. 860; 2 Lev. 88.

*Ball v. Cullimore*, 2 C. M. & R. 120.

<sup>m</sup> Co. Litt. 55.

<sup>n</sup> 5 Rep. 116; Co. Litt. 57, 62.

<sup>o</sup> Litt. a. 69.

<sup>p</sup> Salk. 414; 1 Sid. 339.

reasonable notice to the other, which is generally understood to be six months,<sup>a</sup> and this leaning has gone so far of late, that some have doubted whether an estate at will can ever exist, but it is quite clear that it may be created by the express contract of the parties,<sup>r</sup> although it is also well settled "that what was formerly a tenancy at will by implication shall now be considered a tenancy from year to year, determinable by half a year's notice, expiring at the end of a current year."<sup>s</sup> A tenancy from year to year is therefore an estate for one year certain; and if more than six months elapse without a notice to quit from either party, it becomes an estate for two years at the least.<sup>t</sup>

III. An estate at sufferance is when one comes into [ 150 ] possession of land by lawful title, and keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh lease from the owner of the estate. Or if a man maketh a lease at will and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance.<sup>u</sup> But no man can be tenant at sufferance against the king, to whom no laches or neglect, in not entering and ousting the tenant, is contemplated by law; but his tenant so holding over is considered as an absolute intruder.<sup>v</sup> But in the case of a subject this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant, or bring an action of ejectment, in which entry is admitted; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger:<sup>x</sup> and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will

3. Estates by sufferance.

<sup>a</sup> This kind of lease was in use as long ago as the reign of Hen. 8, when half a year's notice seems to have been required to determine it. T. 13 Hen. 8, 15, 16.

<sup>r</sup> *Richardson v. Langridge*, 4 Taunt. 128.

<sup>s</sup> Mr. J. Coleridge's note. *Clayton v. Blackey*, 8 T. R. 3. *Timmins v.*

*Rowlinson*, 3 Burr. 1609. *Pope v. Garland*, 4 Y. & C. 394.

<sup>t</sup> A portion of the text is here omitted, but will be found in the next chapter.

<sup>u</sup> Co. Litt. 57.

<sup>v</sup> *Ibid.*

<sup>x</sup> *Ibid.* 57.

suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

[ 151 ]

Remedies of  
landlords for  
the recovery  
of possession.

Thus stands the law with regard to tenants by sufferance; and landlords are strictly obliged in these cases to make formal entries upon their lands,<sup>7</sup> and recover possession by the legal process of ejectment: and at the utmost, by the common law, the tenant was bound to account for the profits of the land, so by him detained. But the landlord may enter and take peaceable possession, and the tenant will be liable to an action for any disturbance of that possession; and even if he enter forcibly, the tenant cannot complain, except by a criminal proceeding for a breach of the peace.<sup>a</sup> And now, by statute 4 Geo. II. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over, after the determination of the term, and demand made and notice in writing given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. By statute 11 Geo. II. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. And by statute 1 Geo. IV. c. 87, landlords on bringing ejectments, may give notice to tenants holding over, to appear in term, and on production of the lease or agreement, may move for a rule *nisi* on the tenant to enter into a recognizance for costs; and on the rule being made absolute, if the tenant shall not conform, judgment shall be given for the landlord. And it has been decided that this last statute extends to a tenancy by virtue of an agreement in writing for three months <sup>a</sup>cer-

<sup>7</sup> 5 Mod. 384.

<sup>a</sup> *Doe d. Phillips v. Roe*, 5 B. &

<sup>2</sup> *Taunton v. Costar*, 7 T. B. 131; A. 766.

*Turner v. Meymott*, 1 Bing. 158.

tain but not to a tenancy from year to year, *without* any written agreement or lease,<sup>b</sup> nor to a tenancy for years determinable on lives, though under a written lease.<sup>c</sup> These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.

A more summary proceeding still is given by statute 1 and 2 Vict. c. 74, when possession is unlawfully held over after the determination of the tenancy, where there is no rent, or where the rent does not exceed 20*l.* a year. In such cases the landlord may give the tenant or occupier notice of his intention to proceed to recover possession, under the authority of the act, and if the tenant does not appear or fails to show cause why he does not give possession, two justices of the peace acting for the district may issue a warrant under their hands and seals directing the constables to give the landlord possession.

<sup>b</sup> *Doe d. Bradford v. Roe*, 5 B. & A. 771.

<sup>c</sup> *Doe d. Pemberton v. Roe*, 7 B. & C. 2.

## CHAPTER THE ELEVENTH.<sup>a</sup>

### OF ESTATES BY CUSTOM.

HAVING, in the three preceding chapters, treated of freehold estates and estates less than freehold, it will now be proper shortly to advert to the estates for which lands of copyhold, customary, or base tenure may be held ; all lands in England and Wales being divided, as we have already mentioned,<sup>b</sup> into lands of socage or free tenure, and lands of base tenure or copyhold.

Estates for which copyholds may be held.

Copyholds technically estates at will,

But worthy of a particular mention.

Blackstone has placed the copyholder's estate among estates at will, adverting to it only as "one species of estates at will, that deserves a more particular regard than any other."<sup>c</sup> But although he is no doubt technically correct, so far as their legal estate is concerned,<sup>d</sup> yet this incidental notice is hardly treating with sufficient importance a tenure which extends over a very large portion of the whole land of this country. I have therefore thought it proper somewhat to enlarge his account of copyholds. But it should be observed that many of the peculiarities affecting this tenure have already been noticed in the preceding chapters, and we shall hereafter, in the course of this volume, allude to others. It will, therefore, only be necessary here to mention such matters relating to estates by custom as appear especially worthy of separate notice.

[ 147 ] An estate, then, held by copy of court roll ; or, as we usually call it, a *copyhold* estate, as was before mentioned,<sup>e</sup> was certainly, in its original and foundation,

<sup>a</sup> The text of Blackstone is considerably enlarged in this chapter.

<sup>b</sup> See *ante*, p. 106.

<sup>c</sup> 2 Bl. Com. 147.

<sup>d</sup> Co.Tr. 5.

<sup>e</sup> Page 98.

nothing better than a mere estate at will. But, the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, than has, time out of mind, been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant at will; the custom having arisen from a series of uniform wills. And therefore it is rightly observed by Calthorpe,<sup>f</sup> [ 148 ] that "copyholders and customary tenants differ not so much in nature as in name: for although some be called copyholders, some customary, some tenants by the virge, some base tenants, some bond tenants, and some by one name, and some by another, yet do they all agree in substance and kind of tenure: all the said lands are holden in one general kind, that is, by custom and continuance of time; and the diversity of their names doth not alter the nature of their tenure."

Gradual increase of the copyholder's estate.

tenants  
- Copyhold  
- Customary  
- By virge  
- Base  
- Bond

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humour and temper of the respective ancient lords, (from whence we may account for their great variety,) such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail,<sup>g</sup> for life, by the curtesy, in dower, for years, at

The interest of the copyholder at the present day.

<sup>f</sup> On Copyholds, 51, 54.

<sup>g</sup> But this can only be by particular custom, for the statute *De Donis* is

held not to extend to copyholds. *Doe v. Clark*, 5 B. & Ald. 458, and *ante*, p. 131.

sufferance, or on condition: subject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulgated by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the refusal to attend the customary court, the committing waste,<sup>b</sup> the cutting down timber, the nonpayment of a fine, and the like. Yet none of these interests amount to a freehold; for the freehold of the whole manor abides always in the lord only,<sup>c</sup> who hath granted out the use and occupation, but not the corporeal seisin or true legal possession, of certain parcels thereof, to these his customary tenants at will.

[ 149 ] The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple, and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein.<sup>d</sup> The lords therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins

<sup>b</sup> But reason seems to require that the waste should be either an invasion of the lord's property, as by cutting down trees unauthorised by custom, or at least some act or neglect which tends materially to deteriorate the tenement or destroy the evidence of its identity.

Bac. Abr. 744, &c. Burt. Comp. (1835.) See further as to forfeiture, *post*, chap. 20. s. 7.

<sup>c</sup> Lit. s. 81; 2 Inst. 325.

<sup>d</sup> Mirr. c. 2, s. 28; Litt. s. 204, 5, 6.



became modern copyholders, and had acquired by custom, a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be styled in their admissions tenants at the will of the lord, the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest: and therefore continued, and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders, of free or privileged tenure, which are derived from the ancient tenants in villein socage,<sup>1</sup> and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves;<sup>m</sup> who are sometimes called *customary freeholders*, being allowed to have a freehold custom, though not a freehold tenure.

No copyhold estate can be created at the present day except by virtue and according to the custom of the manor, of which it is parcel.<sup>n</sup> And though generally the lord can grant an estate of inheritance similar to a freehold estate in fee, in many manors he can only grant for life or years. Each manor, indeed, has for itself a system of laws, to be sought in oral tradition, or in the court rolls of proceedings in the customary courts. In some manors the customs are reduced into writing, in the shape of a customary on the presentment of the homage, or by an act of parliament; but there is no settled rule, as to this or any obligation, on any one, to compile such customary.<sup>o</sup>

Entirely dependent on custom.

How customs are proved.

The copyholder, except otherwise empowered by

<sup>1</sup> See p. 101, &c.

<sup>m</sup> Fitz Abr. tit. Corone, 810. Custom, 12 Bro. Ab. tit. Custom, 2, 17. Tenant per Copie, 22. 9 Rep. 76.

Co. Litt. 59. Co. Cop. s. 82. Cro. Car. 229. 1 Roll. Abr. 562. 2 Vent. 148. Carth. 432. Lord Raym., 1225.

<sup>n</sup> See *ante*, 99. <sup>o</sup> 3 R. P. Rep. s. 7.

Copyholders' rights much controlled.

special custom or act of parliament, has only the use of the surface of the land, the minerals belonging to the lord: and of the timber growing on his land, he can only cut what is sufficient for fuel and repairs. As it was intended he should occupy the land himself, for his personal services, he cannot lease it for more than a year, without the license of the lord; and waste, or breach of any of the conditions on which he is supposed to hold it, works a forfeiture.<sup>o</sup> Neither can the lord enter upon the land to cut the timber or dig for the minerals, without the consent of the tenant.<sup>p</sup>

Fines, quit rents, and heriots.

The incidents to which the tenant is subject are most usually fines, quit rents, and heriots, although none of them are peculiar to copyholds. Of the second we have already had occasion to speak.<sup>q</sup> Of the third we shall hereafter give some account.<sup>r</sup> To the first, already mentioned,<sup>s</sup> being by far the most important of any, we may here again advert. Fines, then, are payments due by the custom from the tenant to the lord, usually upon every descent or alienation of the copyhold tenement, and sometimes especially in the north of England, also on the death of the lord. They are either certain or uncertain, or arbitrary. The former are fixed payments, being usually small sums, the latter are regulated by the value of the tenement, at the time of the admittance of the tenant or the death of the lord, and thus being a payment to the lord on the improved value of the land, fall as a tax upon the capital of the tenant laid out in improvement.<sup>t</sup> The will of the lord is, however, usually restrained to the amount of two years' improved value of the tenement;<sup>u</sup> and sometimes a smaller sum is taken in cases of alienation, but when several tenants are admitted as joint tenants a further claim is made.<sup>v</sup>

Fines are either certain or uncertain.

<sup>o</sup> 3 R. P. Rep. s. 7. *Doe v. Wil-*  
*son*, 11 East. 56. See *ante*, p. 174.

<sup>p</sup> *Whitechurch v. Holworthy*, 4 Mau.  
& Sel. 340. *Lewis v. Brentnall*, 2 B.  
& Adol. 437.

<sup>q</sup> *Ante*, 45, 99.

<sup>r</sup> See *post*, ch. 30.

<sup>s</sup> See *ante*, p. 100.

<sup>t</sup> 3 H. R. Rep. § 7.

<sup>u</sup> 1 Watk. Cop. 308. *Lord Verulam*  
*v. Howard*, 7 Bing. 327.

<sup>v</sup> 3 R. P. Rep. § 7. *Wilson v. Hoare*,  
2 B. and Ad. 350, and 10 Ad. and  
E. 236.

The great criterion of a customary estate is that all alienations of it must be transacted, in part at least, in the lord's court,<sup>z</sup> which court must not be confounded with the court baron, properly so called; for though it commonly happens that they are held at the same time and the same roll serves to record the proceedings of both, the two courts are of a nature essentially distinct. To the court baron the freeholders of the manor are suitors as judges; to the customary court, the copyholders are suitors not as judges but as assistants to the lord or his steward, one or other of whom alone exercises the judicial authority.<sup>y</sup> And though there should happen a failure of suitors to the court baron, consequently, in strictness of law an extinction of the manor, yet for all purposes to which the customary court is applicable, the jurisdiction will continue.<sup>z</sup> The lord may become absolutely entitled to a customary tenement of inheritance, either by forfeiture, by escheat, or by assurance made to his own use. And in all these cases, and also upon the expiration of any customary estate, when no customary inheritance exists, the lord may make a new grant of the tenement in the manner prescribed by the custom.<sup>a</sup> Any separation of the tenement from the manor by a conveyance or act unauthorised by the custom for ever destroys its customary quality, if the lord were seised in fee simple, but if he had only a particular estate in the manor, this quality would only be suspended during the continuance of that estate or of the derivative estate created by the conveyance or lease.<sup>b</sup>

Criterion of  
a customary  
estate.

When copy-  
holds may be  
re-granted.

Copyhold estates are still ranked in common cases [ 150 ] (according to their origin) among tenancies at will, though custom, which is the life of the common law, has established a permanent property on the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself; nay, sometimes even superior, "for we may now," says Blackstone, "look upon a copyholder of inheritance with a fine

Advantages  
of copyhold  
estates.

<sup>z</sup> Litt. §§. 74, 75.

<sup>a</sup> Burt. Comp. 1341.

<sup>y</sup> Co. Litt. 58 a. Burt. Comp. (1261.)

<sup>b</sup> Harg. Co. Litt. 58 b, n. 7. *Roe v. Loveless*, 2 B. & A. 453.

<sup>z</sup> Co. Tr. 53.

certain to be little inferior to an absolute freeholder in point of interest, and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation."

Disadvantages.

Desire on the part of the legislature to facilitate enfranchisement, 4 & 5 Vict. c. 35, am. by 6 & 7 Vict. c. 23.

When, however, the fine is uncertain, and the custom of the manor oppressive and ill-defined, it has long been desired that greater facilities should be given for converting the lands so burdened into free and common socage;<sup>c</sup> and in pursuance of this feeling, the legislature has recently endeavoured to facilitate their enfranchisement by the stat. 4 & 5 Vict. c. 35, (amended by stat. 6 & 7 Vict. c. 23,) of which it will be proper to give a short account.

By that act, "the Copyhold Commission" is established,

<sup>c</sup> In their 3rd Report the Real Property Commissioners say, "Free and common socage is fortunately the tenure by which the great bulk of real property in England is now held. In the time of Lord Coke copyhold tenure was much more common than at present, and the land that was not of base tenure was principally held in chivalry. To the enfranchisements of copyholds and the abolition of military tenures, may, we conceive, be ascribed some portion of the agricultural improvements and increase of public wealth which have since taken place; and we consider it of great importance that all lay fees should be held by free and common socage."

Bills giving facilities to the enfranchisement of copyholds, founded on the recommendations in the 1st and 3rd Report of the Real Property Commissioners, have accordingly been introduced into Parliament for several years past. In the year 1838 these bills were referred to a Select Committee, which made a report in favour of the gradual but entire enfranchisement of copyholds. A bill, founded on this report, was introduced into Parliament by the present writer, in conjunction with the Attorney-General, then Sir John now Lord Campbell, and Mr. Freshfield, in the year

1839, which passed the House of Commons, but was postponed by the House of Lords, owing to the late period at which it was brought up. It was introduced into the House of Lords by Lord Brougham in the ensuing session, (1840,) and was shortly followed by another bill on the same subject, introduced by Lord Redesdale, which adopted many of the clauses of the preceding bill, but provided also for the commutation of copyholds, of which I shall give some account in the text, and ultimately the bill introduced by Lord Redesdale, with some alterations, passed into law, being the statute 4 & 5 Vict. c. 35, having been undertaken in the House of Commons by Mr. George Hope. This short history of this measure may not be uninteresting to the reader. The present act is almost entirely voluntary; the bills introduced by myself in 1839 and by Lord Brougham in 1840 contained compulsory clauses, and I may be permitted here to state, that as applied to copyholds subject to arbitrary fines and heriots, I remain of opinion that the compulsory principle might be carried into operation with great benefit to the public, and not only without prejudice but very much to the advantage both of lord and tenant.

to be composed of three commissioners who shall act as a board for carrying the act into execution.<sup>d</sup> And the act may be carried into operation in two ways,—by commutation and by enfranchisement.

1. *Commutation*.—By a commutation, the most burdensome incidents affecting copyhold and customary property, as rents, fines, heriots, and rights in timber, may be commuted for corn-rents or fixed fines, or for pieces of land, part of the copyholds commuted, and leaving the copyhold tenure in other respects undisturbed. This commutation can in no case be made compulsory on the lord: but three-fourths of the tenants in number and value, at a meeting called for that purpose, may bind the remaining fourth, (s. 13.) When the agreement for this purpose is executed, it must be confirmed by the commissioners, (s. 23.) After receipt of the valuation, the commissioners shall cause a schedule of apportionment to be made for the purpose of completing the commutation, (s. 31,) which schedule, when it has been duly inspected, and its errors, if any, rectified, shall be confirmed, (s. 32,) and copies thereof deposited with the steward of the manor and the clerk of the peace, (s. 33). From the first day of January next following the confirmation, the lands of the manor shall be discharged from the payment of all the lord's rents, fines, (except in certain cases a nominal fine,) and heriots, and from the lord's right of timber, and every other right which may be the subject of commutation, and instead thereof there shall be payable a rent-charge, variable according to the price of corn, or a fixed fine, as the case may be, (s. 36,) or a piece of land shall be conveyed to the lord, (6 and 7 Vict. c. 23, s. 1.)

Besides these commutations, which are thus to some extent compulsory, commutations purely voluntary may be effected by any lord of a manor with any one or more tenant or tenants of such manor, (s. 52, and 6 and 7 Vict. c. 23, ss. 1 and 3.) After the final confirmation of the commutation, the customary modes of descent are to cease, and the lands to descend, and to be subject to dower and curtesy, in like manner as freehold lands,

<sup>d</sup> 4 & 5 Vict. c. 35, s. 2.

(s. 79.) But the custom of gavelkind, so far as it exists in the county of Kent, is exempted from the operation of the act, (s. 80.)

**Enfranchisement.**

2. *Enfranchisement.*—Enfranchisements may also be effected under the Act; but these are purely voluntary, being neither compulsory on the lord, nor on any portion of the tenants. They are chiefly regulated by 4 and 5 Vict. c. 35, s. 56, and by 6 and 7 Vict. c. 23, ss. 1 and 2, and may be either general, or partial, or individual. Any lord of any manor, whatever may be his estate or interest, may, with the consent of the Commissioners, enfranchise all or any of the lands holden of his manor in consideration of such sum or sums of money, whether payable forthwith or at a future time, as shall be agreed on; and any tenant, whatever may be his estate or interest, may accept such enfranchisement, (s. 56). Whenever so many as *six* tenants, or all the tenants of the manor, shall agree with the lord to effect an enfranchisement, it may be effected by a schedule of apportionment, which may either be prepared by the parties or by the steward; and such schedule shall state the sums to be paid for enfranchisement, and the periods of the payment, and the compensation, if any, to the steward, and all other matters requisite, (s. 56, and 6 and 7 Vict. c. 23, s. 11.) This schedule is exempted from stamp duty, (s. 93.) When the estate of any party to such enfranchisement shall be less than an estate of fee simple in possession, or corresponding copyhold estate, notice in writing must be given to the remainder-man or reversioner, so that his assent or dissent may be stated in writing to the commissioners, and in case of his dissent the commissioners may ascertain that the proposed enfranchisement is not properly open to objection, (s. 56.)

An enfranchisement may be made in consideration—  
1. Of a gross sum of money, (s. 56;) or 2. Of a corn rent charge, (6 and 7 Vict. c. 23, s. 1;) or 3. Of a conveyance of lands, parcel of the same manor as the lands enfranchised, (6 and 7 Vict. c. 23, ss. 1 and 3.) When the enfranchisement shall not be entered into by all the tenants of a manor, or their number shall be less than six, or whatever may be their number, if the parties shall

think fit, an enfranchisement may be effected with the consent of the Commissioners by such conveyance, deed, or assurance, as would be adopted if the lord were seised in fee simple, (s. 57, and 6 and 7 Vict. c. 23). This deed of enfranchisement, however, is not exempted from stamp duty by the act, and will be in the usual form.

Some alterations are also made by this act with respect to copyhold, chiefly with reference to the mode of alienation by surrender and admittance : but this part of the subject will be more conveniently considered in a subsequent chapter.\* Enfranchisements may therefore be made under the act, or they may be made independently of the act.<sup>f</sup> In either case, if the lord make a legal conveyance of the copyholder's tenement to him in fee-simple, the tenement is said to be enfranchised. The general doctrine on the subject seems to depend on the principle that the copyholder is a tenant at will, and that therefore by the accession of the reversion his estate is merged.<sup>g</sup> If such a conveyance be made to a copyhold tenant having a life estate, the copyhold estate would also be extinguished, and the tenant would take the legal estate in fee, subject to the equitable estates in remainder.<sup>h</sup>

Enfranchisements.

Effect of enfranchisement.

\* See *post*, ch. 24, "of alienation by special custom."

<sup>f</sup> See 4 & 5 Vict. c. 35, s. 83.

<sup>g</sup> Burt. Comp. (1351.)

<sup>h</sup> *Dunn v. Green*, 3 P. W. 9:  
*Challoner v. Marshall*, 2 Ves. I. 524.  
*Roe v. Briggs*, 16 East. 406.

## CHAPTER THE TWELFTH.

## [ 152 ] OF ESTATES UPON CONDITION.

Estates upon  
condition.

BESIDES the several divisions of estates, in point of interest, which we have considered in the four preceding chapters, there is also another species still remaining, which is called an estate *upon condition*: being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.<sup>a</sup> And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates then upon condition, thus

Of two sorts. understood, are of two sorts: I. Estates upon condition *implied*: II. Estates upon condition *expressed*: under which last may be included, III. Estates held *in vadio*, *gage*, or *pledge*: IV. Estates by *statute merchant* or *statute staple*: V. Estates held by *elegit*.

Estates upon  
condition  
implied.

I. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office,<sup>b</sup> on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person.<sup>c</sup> For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied con-

[ 153 ]

<sup>a</sup> Co. Litt. 201.

<sup>b</sup> Litt. s. 378.

<sup>c</sup> *Ibid.* 379.



dition. 1. By *mis-user*, or abuse; as if a judge takes a [ 153 ] bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture: but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby.<sup>d</sup> For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.\*

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee simple; this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to.<sup>f</sup> So if any tenant for years, for life, or in fee, committed felony, the king, in the first instance, and the king or other lord of the fee in the others, is entitled to have their lands, because their estate was determined by the breach of the condition "that they should not commit felony," which the law tacitly annexed to every feudal donation; but this will now only be to the prejudice of the offender himself; for, first, it was enacted by the 54 Geo. 3, c. 145, that after the passing of that act, no attainder for felony, except in cases of high treason, petit treason or murder, should extend to the disinheriting of any heir, or to the prejudice of any other person than the offender during his natural

*Mis-user, and non-user.*

*The doctrine of forfeiture of estates.*

*Attainder on felony now only extends to the offender himself.*

<sup>d</sup> Co. Litt. 233.

<sup>e</sup> 9 Rep. 50.

<sup>f</sup> Co. Litt. 215. In some copyhold estates this may be done by the custom.

life; and still more recently, it was enacted by the 3 & 4 W. IV., c. 106, s. 13, that after the death of *any* person attainted, his descendants may inherit.<sup>s</sup>

[ 154 ] II. An estate on condition expressed in the grant itself, is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.<sup>h</sup> These conditions are therefore either *precedent* or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A. upon his marriage with B., the marriage is a precedent condition, and till that happens no estate<sup>i</sup> is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term, he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid.<sup>k</sup> But if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent; and that, if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.<sup>l</sup> To this class may also be referred all base fees, and fees simple, conditional at the common law.<sup>m</sup> Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so if a personal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the statute of Westminster the Second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the ninth chapter: as *durante viduitate*, &c.:

<sup>s</sup> And see *post*, chap. 17.

<sup>h</sup> Co. Litt. 201 a.

<sup>i</sup> Show. Parl. Cns. 83, &c.

<sup>k</sup> Co. Litt. 217 b.

<sup>l</sup> Litt. s. 325.

<sup>m</sup> See *ante*, p. 127—129.

II. Estates on condition expressed, which may be either precedent or subsequent.

these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these [ 155 ] subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

A distinction is however made between a *condition in deed* and a *limitation*, which Littleton<sup>n</sup> denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of the creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fall, this is denominated a *limitation*: as when land is granted to a man, *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like.<sup>o</sup> In such case the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the 500*l.*) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.,<sup>p</sup>) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make an entry in order to avoid the estate.<sup>q</sup> Yet, though strict words of condition be used in the creation of the estate, if on a breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by A. to B., on condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs) this the law

Distinction between condition in deed and a limitation.

<sup>n</sup> Sec. 380; Co. Litt. 234.

<sup>o</sup> 10 Rep. 41.

<sup>p</sup> *Ibid.* 42.

<sup>q</sup> Litt. s. 347; stat. 32 Hen. 8, c. 34.

[ 156 ] construes to be a limitation and not a condition :<sup>r</sup> because, if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry ; but, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devise land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation ; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition.\*

Conditional  
limitation :

Description  
of.

A conditional limitation, to which we may here shortly advert, partakes of the nature both of a condition and a remainder. It is to be observed that at the common law, whenever either the whole fee or a particular estate, as an estate for life or in tail, was first limited, no condition or other quality could be annexed to this prior estate, which would have the double effect of defeating the estate and passing the land to a stranger, for as a remainder it was void, being an abridgment or defeasance of the estate first granted ; and as a condition it was void, as no one but the donor or his heirs could take advantage of a condition broken ; and the entry of the donor or his heirs unavoidably defeated the livery upon which the remainder depended. On these principles, it was impossible by the old law to limit by deed, if not by will, an estate to a stranger upon any event which might abridge or determine an estate previously limited. But the expediency of such limitations, assisted by the revolution effected by the Statute of Uses, which has already been adverted to,<sup>t</sup> at length established them, in spite of the maxim of law that a stranger cannot take advantage of a condition. These limitations have now become frequent, and their mixed nature has given them the name of conditional limitations ; they so far partake of the nature of conditions, as they abridge or defeat the estates previously limited, and they are so far limitations, as upon the contingency taking effect, the estate passes to a stranger. Such is the limi-

<sup>r</sup> 1 Ventr. 202.

\* Cro. Eliz. 205 ; 1 Roll. Abr. 411.

<sup>t</sup> See *ante*, p. 116.

tation to A. for life, in tail or in fee, provided that when C. returns from Rome, it shall from thenceforth remain [ 156 ] to the use of B. in fee."

In all these instances of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed, be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold; because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner, (as a grant for ninety-nine years, provided A., B., and C., or the survivor of them, shall so long live,) this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with *Jane S.* by such a day; (within which time the woman dies, or the feoffor marries her himself) or unless he kills another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determined: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not

Grantee on condition may have an estate of freehold.

What conditions are void.

\* See Fearn. Cont. Rem. p. 9, 7th ed.; Dougl. Rep. 727, n.; and Butl. Co. Litt. 203 b, n.

† Co. Litt. 42.

be defeated afterwards by a condition either impossible, illegal, or repugnant.\* But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee: here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed.† But when the condition is valid, it is also capable of being waived by the grantor, and the law will consider he has waived it, if, after notice of the breach committed, he does any act inconsistent with an intention to avail himself of the forfeiture.‡

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are,

Estates in  
pledge are  
*vivum va-*  
*dium*,

III. Estates held in *vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

and mort-  
gage.

[ 158 ]  
Description  
of a mort-  
gage.

*Vivum vadium*, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be sold as soon as such sum is raised, and is now called a Welsh mortgage.§ And in this case the land or pledge is said to be living: it subsists, and survives the debt; and, immediately on the discharge of that, results back to the borrower.¶ But *mortuum vadium*, a dead pledge, or *mortgage*, (which is much more common than the other) is where a man borrows of another a specific sum (*e. g.* 200*l.*), and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor: in this case the land, which is so put in pledge, is by law, in case of non-payment at the time limited, for ever dead and gone

\* Co. Litt. 206.

v. *Lewis*, 5 B. & Ad. 277.

† *Ibid.*

§ Powell on Mort. 373 a, 6 ed.

‡ Co. Litt. 218 a. Cro. Jac. 398. *Doe*

¶ Co. Litt. 205.

from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage.<sup>c</sup>

But, as it was formerly a doubt,<sup>d</sup> whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances, of the mortgagee (though that doubt has been long ago overruled by our courts of equity;) it therefore became usual to grant only a long term of years, by way of mortgage; with condition to be void on repayment of the mortgage-money: which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to insert a provision that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here the courts of equity interpose: and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they consider the lands only as a security for the money advanced, and will therefore enquire into the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. And this

Rights of mortgagee.

[ 159 ]

<sup>c</sup> Litt. s. 332.

<sup>c</sup> Hardr. 466.

<sup>d</sup> *Ibid.* s. 357; Cro. Car. 191.

Mortgagor  
must now  
redeem in  
20 years.

(Equity of  
redemption,  
what it is.

reasonable time is now fixed by statute,<sup>f</sup> following a long established rule of the courts of equity, to be twenty years, from the time at which the mortgagee took possession, or from the last written acknowledgment of the right of the mortgagor, at the end of which period the mortgagor will be absolutely barred. This advantage, allowed to mortgagors, is called the equity of redemption: and this enables a mortgagor to call on a mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. And this equity of redemption is considered an actual estate in equity, and has all the incidents thereof. Thus it may be mortgaged again, is subject to dower and curtesy, and is in almost all respects similar to a legal estate. But on the other hand the mortgagee may, when there is a power of sale in the deed, which is very usual, either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently; or, in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to close his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages,<sup>g</sup> the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not however usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment and take the land into his own hands, in the nature of a pledge, or the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor.<sup>h</sup> But by stat. 3 & 4 W. IV. c. 27, s. 1, explained by stat. 1 Vict. c. 28, it is enacted that mortgagees must bring any action or suit to recover the land mortgaged

<sup>f</sup> 3 & 4 W. 4, c. 27, s. 28.

<sup>g</sup> Stat. 4 & 5 W. & M. c. 16.

<sup>h</sup> *Pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam*

*traditor creditori. At eum, quæ sine traditione nuda conventionione tenetur, proprie hypothecæ appellatione contineri dicimus.* Inst. l. 4, t. 6, s. 7.



within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit, shall have first accrued. And by statute 7 Geo. II. c. 20, after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet*;" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari.*"<sup>1</sup> And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

Mortgages are made, as we have already said, either in [ 160 ] fee, or for a term of years. A mortgage in fee is in general a preferable security to a mortgage for a term of years, and since the introduction of trusts and powers of sale, the advantage is more peculiarly striking. Indeed, the only obvious advantage to the mortgagee, in a term of years, is that on his decease, the lands devolve on his personal representatives, who are also entitled to the beneficial interest in the mortgage sum. The latter was also, in general, until lately, a less expensive security, as a mortgage in fee was almost always effected by lease and release, and two deeds were therefore necessary. But now the necessity for the lease for a year is dispensed with, although the stamp duty on this instrument must still be paid.<sup>k</sup>

In a mortgage the following clauses are usually introduced:—The mortgagor conveys the lands to the mort-

How mortgages are made.

Mortgages, what clauses are introduced.

<sup>1</sup> l. 10, c. 8.

22. See a form of a mortgage in fee,

<sup>k</sup> 4 Vict. c. 21; and see *post*, ch.

Appendix No. III.

gagee in fee, or for a term of years; provided that, if the mortgage money and interest shall be paid on a particular day, usually six months after the conveyance, the deed shall be void; or, according to the more modern form, and particularly if the mortgage is in fee, that the mortgagee will convey the premises to the mortgagor free from all incumbrances: the mortgagor then covenants that he will pay the sum borrowed and interest; and for title; that is, that he is seised in fee and has good right to convey, and that if the sum borrowed or interest thereon be not paid, the mortgagee may enter upon the premises and quietly enjoy them, free from all incumbrances whatever; and moreover, that if this sum and interest be not paid, then that he, the mortgagor, will do any other act for assuring the lands to the mortgagee that he may require. Then follows a proviso for quiet enjoyment by the mortgagor until default shall be made in the payment of the mortgage money or interest. These are the clauses that are usually introduced. But of late a power is frequently given to the mortgagee to sell the mortgaged premises, if default in payment of the money be made: and if they consist of houses or buildings, provisions for insurance and for repairing should be inserted, to indemnify the mortgagee for their loss, or to preserve their value, and under them he may himself insure or repair; and the mortgagor cannot redeem without paying the sums so advanced, together with the mortgaged debt.<sup>1</sup> The mutual interest will be attended to by giving the mortgagor power to lease, which, of himself, he cannot<sup>m</sup> exercise with effect, being a tenant for years, until default is made in payment of the money, and a tenant by sufferance afterwards;<sup>n</sup> but this power may also be given to the mortgagee. When a power of sale enabling the mortgagee to sell the premises is introduced, the mortgagee need not act on his other remedies but avail himself of his power,<sup>o</sup> which, if the security be sufficient, will give him complete justice in his own hands, as he may exercise this power without

<sup>1</sup> *Gordon v. Graham*, 7 Vin. Abr. 52, pl. 237; *Ex parte Hooper and others*, 1 Mer. 7.

Rep. 449.

<sup>n</sup> *Coote*, 328.

<sup>o</sup> *Clay v. Sharpe*, Sug. Vend. 20;

<sup>m</sup> *Keech v. Hall*, Doug. 21; 3 East

18 Ves. 344.

the concurrence of the mortgagor, although notice to him is sometimes required.<sup>p</sup>

IV. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant* and *statute staple*; which are very nearly related to the *vivum vadium* before-mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seised in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied: and, during such times as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the Recorder of London: whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which direct such recognizances to be enrolled and certified into chancery. But these by the statute of frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record. It may be observed, in conclusion, that these securities

4. Statute merchant and statute staple.

<sup>p</sup> *Corder v. Morgan, Lewis v. Mocham*, 1 Mer. 179. See a form of a mortgage in fee, Append. No. III.

by statute staple and statute merchant have long fallen into disuse.

5. Estate by  
*elegit*.

What it is.

[ 161 ]

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. An *elegit* is the name of a writ, founded on the statute of Westm. 2,<sup>a</sup> by which, after a plaintiff had obtained judgment for his debt at law, the sheriff gave him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages were fully paid: and, during the time he so held them, he was called tenant by *elegit*, and now by stat. 1 & 2 Vict. c. 110, s. 11, the *whole* of such lands and tenements may be delivered to such tenant by *elegit*, subject to account in equity for the rents. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable, that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*,<sup>r</sup> it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2, permitted only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year<sup>s</sup>) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

Nature of  
these three  
last estates.

[ 162 ]

I shall conclude what I had to remark of these estates by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke: "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds;" (which makes them an exception to the general rule) "because though they may hold an estate of inheritance, or of life, *ut liberum*

<sup>a</sup> 18 Edw. 1, c. 18. See further as  
to an *Elegit*, *Private Wrongs*, ch. 27.

<sup>r</sup> 18 Edw. 1.

<sup>s</sup> 13 Edw. 1.

<sup>t</sup> 1 Inst. 42, 43.

*tenementum*, until their debt be paid ; yet it shall go to their executors : for *ut* is similitudinary ; and though, to recover their estates, they shall have the same remedy (by assise) as a tenant of the freehold shall have," yet it is but the similitude of a freehold, and *nullum simile est idem*." This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold : but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir ; which is probably owing to this : that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession ; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in those to whom the debts if recovered would belong. For, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executor :<sup>w</sup> because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund, out of which he has directed them to be paid.

<sup>w</sup> The words of the statute *de mercatoribus* are, "*puisse porter bref de nouvelle disseisine, auxi sicum de frank-*

*tenement*."

<sup>w</sup> Co. Litt. 42.

## CHAPTER THE THIRTEENTH.

ON ESTATES IN POSSESSION, REMAINDER,  
AND REVERSION.

Estates are  
in possession,  
remainder, or  
in reversion.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view ; with regard to the *time of their enjoyment*, when the actual pernanacy of the profits, (that is, the taking, perception, or receipt of the rents and other advantages arising therefrom) begins. Estates therefore, with respect to this consideration, may either be in *possession*, or in *expectancy* : and of expectancies there are two sorts ; one created by the act of the parties, called a *remainder* ; the other by act of law, and called a *reversion*.

I. Estates in  
possession.

I. Of estates in *possession*, (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*) there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind ; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

[ 164 ]

II. Estates in  
remainder,  
description  
of.

II. An estate then in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs for ever : here A. is tenant for years, remainder to B. in fee.

In the first place, an estate for years is created or carved out of the fee, and given to A. ; and the residue or remainder of it is given to B. But both these interests are in fact only one estate ; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee.<sup>a</sup> They are indeed different *parts*, but they constitute only one *whole* : they are carved out of one and the same inheritance : they are both created, and may both subsist, together ; the one in possession, the other in expectancy. So if land be granted to A. for twenty years, and after the determination of the said term to B. for life ; and after the determination of B.'s estate for life, it be limited to C. and his heirs for ever : this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions : there is first A.'s estate for years carved out of it ; and after that B.'s estate for life ; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only : being nothing but parts or portions of one entire inheritance ; and if there were a hundred remainders, it would still be the same thing ; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And at common law, no remainder can be limited after grant of an estate in fee simple :<sup>b</sup> because he that is tenant in fee hath in him the *whole* of the estate : a remainder therefore, which is only a portion or residuary *part* of the estate, cannot be reserved after the whole is disposed of. A particular estate with all the remainders expectant thereon is only one fee simple, as 40*l.* is a part of 100*l.*, and 60*l.* is the remainder of it ; wherefore, after a fee simple once vested, there can at the common law no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting. But under the statute of uses a remainder may Shifting uses. in effect be limited after the grant of a fee simple. Thus a limitation may be made to the use of B. and his heirs,

<sup>a</sup> Co. Litt. 27.<sup>b</sup> Plowd. 29 ; Vaugh. 269.

but upon the happening of a particular event, then to the use of C. and his heirs, and on the happening of the event, the lands will go over to C. and his heirs. This limitation would have been void at common law, and can only take effect under the statute of uses, under the name of a springing or shifting use.<sup>c</sup>

[ 165 ] Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded; and in laying down these rules care must be taken to distinguish between what may be done at common law, and what under the statute of uses.

I. There must be a particular estate.

1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder.<sup>d</sup> As, an estate for years to A., remainder to B. for life; or, an estate for life to A., remainder to B. in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* in strictness is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

Estates of freehold could not be created in future at common law.

An estate created to commence at a distant period of time, without any intervening estate, is therefore strictly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only at the common law be made of chattel interests, which were considered in the light of mere contracts by the ancient law,<sup>e</sup> to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is a rule of the common law, that an estate of freehold cannot [ 165 ] be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder:<sup>f</sup> be-

<sup>c</sup> See *ante*, p. 115.

<sup>d</sup> Co. Litt. 49; Plowd. 25.

<sup>e</sup> Raym. 151.

<sup>f</sup> 5 Rep. 94.



cause at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance to B. of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void at common law. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here by the livery the freehold is immediately created, and vested in B., during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in presenti*, though to be occupied and enjoyed *in futuro*.

But under the statute of uses an estate may be limited to commence *in futuro*. Thus, if a man covenant to stand seised to the use of the heirs of his own body, or to the use of another after his own death, or if he bargain and sell his lands after seven years, in each of these cases the grant is good, and until the event takes place the use results to the grantor. But in conveyances operating by way of transmutation of possession, it is necessary that a present seisin should be transferred in order to serve the resulting use. Thus if a feoffment or lease and release be made to J. S. and his heirs, to commence four years from thence, or after the death of the grantor, the limitation of

Under the statute of uses an estate may be limited in futuro.

the use to J. S. is good ; for during the four years or the life of the grantor it will result and be executed. But if the conveyance had been to J. S. and his heirs, after the death of the grantor, to the use of J. S. and his heirs, it would have been void, because it is the grant of an estate of freehold to commence *in futuro*.<sup>g</sup>

Proposed alteration of commissioners.

The Real Property Commissioners propose to abolish this distinction between the rule of the common law and the rule under the statute of uses, and to enact that estates may at common law be conveyed or created to commence at a future time, whether certain or uncertain.<sup>h</sup> If this be done, the first rule laid down by Blackstone will so far as it relates to future estates be abolished, and in effect a remainder may then be created without any particular estate to support it.

What estate will support a remainder.

As no remainder can in strictness be created, without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over.<sup>i</sup> For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance : and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must at common law be given at the time of its creation ; and the entry of the grantor, to do this, determines the estate at will in the very instant in which it is made :<sup>k</sup> or, if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder* : for it is a separate independent contract, distinct from the precedent estate at will ; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken.<sup>l</sup> And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also :<sup>m</sup> as where the particular estate is an estate for the life of a

If the particular estate be void, the remainder will be defeated.

<sup>g</sup> Sand. Uses, 4th edit. 136—138.

<sup>h</sup> See 3rd Real Property Rep.

<sup>i</sup> 3 Rep. 75.

<sup>k</sup> Dyer, 18.

<sup>l</sup> Baym. 151.

<sup>m</sup> Co. Litt. 208.

person not in *esse*;<sup>a</sup> or an estate for life upon condition, on breach of which condition the grantor enters and voids the estate;<sup>o</sup> in either of these cases the remainder over is void.

2. A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate.<sup>p</sup> As, where there is an estate to A. for life, with remainder to B. in fee; here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise the remainder is void.<sup>q</sup> Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law.<sup>r</sup> But this rule, although undoubted at common law, does not, it is to be observed, apply to limitations which take effect under the statute of uses. Thus if A. covenant to stand seised to the use of B. after his own death, this will be in effect a valid remainder.

2. The remainder must commence at the time of the creation of the particular estate.

3. A third rule respecting remainders is this; that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines.<sup>s</sup> As, if A. be tenant for life, remainder to B. in tail; here B.'s remainder is vested in him, at the creation of the particular estate to A. for life; or, if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder

3. The remainder must vest during the continuance of the particular estate, or *eo instanti* that it determines.

<sup>a</sup> 2 Roll. Abr. 415.

<sup>o</sup> 1 Jon. 58.

<sup>p</sup> Litt. s. 671; Plowd. 25.

<sup>q</sup> Litt. s. 60.

<sup>r</sup> Co. Litt. 49.

<sup>s</sup> Plowd. 25; 1 Rep. 66.

vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A. for life, and on his death and one year after to B. and his heirs, here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination of the particular estate.<sup>†</sup> And this depends upon the principle before laid down, that the precedent particular estate and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby;<sup>‡</sup> the thing supported must fall to the ground, if once its support be severed from it.

Remainders are either vested or contingent. Vested remainders, what they are.

[ 169 ]

Contingent remainders, what they are.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate;<sup>‡</sup> whereas a vested remainder is where there is a present capacity of taking effect in possession if the particular estate were to determine. By these rules every remainder should be tried, to ascertain whether it be vested or contingent.

Instances of contingent remainders, where the person is uncertain.

Contingent remainders may be limited to a dubious and uncertain *person*. As if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail; this is

<sup>†</sup> 1 Rep. 138. Fearne, 307.

<sup>‡</sup> 3 Rep. 21.

<sup>‡</sup> Fearne Cont. Rem. p. 3, 215, 7th edit.

a contingent remainder, for it is uncertain whether B. will have a son or no ; but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone ; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. were tenant for life, remainder to his own eldest son in tail, and A. died without issue born, but leaving his wife *enceinte* or big with child, and after his death, a posthumous son was born, this son could not take the land, by virtue of this remainder ; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest.\* But, Posthumous children may take in remainder. to remedy this hardship, it is enacted by statute 10 & 11 W. III., c. 46, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime ; that is, the remainder is allowed to vest in them, while yet in their mother's womb.†

This species of contingent remainders, to a person not in being, must however, according to Blackstone, be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines.‡ Possibility on a possibility. As if an estate be made to A. for life, remainder to the heirs of B. ; now, if A. dies before B. [ 170 ] the remainder is at an end ; for during B.'s life he has no heir, *nemo est haeres viventis* : but if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B.'s dying before A. is *potentia propinqua*, and therefore allowed in law.§ But a remainder to the right heirs of B. (if there be no such person as B. *in esse*) is void.¶ For here there must two contingencies happen ; first, that such a person as B. shall be born ; and, secondly, that he shall also die during the continuance of the particular estate ; which make it *potentia remotissima*, a most improbable possi-

\* 3 Rep. 20.

‡ Co. Litt. 378.

† Salk. 228 ; 4 Mod. 282.

¶ Hob. 33.

‡ 2 Rep. 51.

bility. A remainder to a man's eldest son, who hath none (we have seen) is good; for by common possibility, he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name.<sup>c</sup> A limitation of a remainder to a bastard before it is born, is not good;<sup>d</sup> for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

But this doctrine of a possibility on a possibility being void, although derived from Lord Coke,<sup>e</sup> seems of late to be considered untenable. Mr. Preston considers it quaint and unintelligible, and is of opinion that a remainder to an unborn son of a particular name would be valid;<sup>f</sup> and Mr. Butler says that at any rate the doctrine must not be understood in too large a sense, and cites the case of *Routledge v. Dorril*,<sup>g</sup> where, so far as concerns personal estate, it was disregarded. It should be also remarked that a limitation to a bastard, of which a particular woman is pregnant, is valid.<sup>h</sup>

Where the event is uncertain.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. The instance of this rule given by Blackstone is where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee; here, he says, B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, and the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and if B. dies first, it never can vest in his heirs, but is for ever gone; but if A. dies first, the remainder to B. becomes vested. But this is not a correct instance of a contingent remainder, as although in its

<sup>c</sup> 5 Rep. 51.

<sup>d</sup> Cro. Eliz. 509.

<sup>e</sup> Co. Litt. 25 b. 184 a.

<sup>f</sup> 1 Prest. Abs. 129.

<sup>g</sup> 2 Ves. jun., 357; Butl. Fearn, n. (i), p. 261, 7th edit.

<sup>h</sup> *Gordon v. Gordon*, 1 Meriv. 141; *Dawson v. Dawson*, 6 Mad. & Geld. 292.

terms contingent, it is in fact a limitation of the land to A. for life, remainder to B. in fee; and if A.'s estate is determined, there is a present capacity in B. to take the remainder.<sup>i</sup> But where there is a limitation to A. for life, remainder to B. after the death of J. S., or when a third person returns from Rome; in the first case, if the tenant for life should die before the death of J. S., or before the person returns from Rome, B. would not take.<sup>k</sup> These, therefore, are contingent remainders, depending on an uncertain event.

Contingent remainders of either kind, if they amount [ 171 ] to a freehold, cannot be limited to an estate for years, or any other particular estate, less than a freehold. Thus if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void;<sup>l</sup> but if granted to A. for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere: unless therefore the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void. But a right of entry to an estate of freehold will support a contingent remainder.<sup>m</sup>

Contingent remainders must be limited on a freehold.

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested.<sup>n</sup> Therefore when there is tenant for life, with divers remainders in contingency, he may not only by his death, but by feoffment, and also fine or recovery, (when these assurances existed,) by surrender, or other methods, destroy and determine his own life-estate, before any of those remainders vest, the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders

How contingent remainders may be destroyed.

<sup>i</sup> *Barrington v. Parkhurst*, 3 Atk. 135, Willes, 337; *Fearne Cont. R.* 331.

<sup>k</sup> Willes, 337.

<sup>l</sup> 1 Rep. 130.

<sup>m</sup> *Fearne Cont. Rem.* 286, 7th ed.

<sup>n</sup> 1 Rep. 66, 135.

his life-estate, he by that means defeats the remainder in tail to his son : for his son not being *in esse*, when the particular estate determined, the remainder could not then vest ; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases therefore it is necessary to have trustees appointed to preserve the contingent remainders ; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If therefore his estate for life determines otherwise than by his death, the estate of

[ 172 ] the trustees, for the residue of his natural life, will then take effect and become a particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars ; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life :<sup>o</sup> and when, after the restoration, these gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use. But equitable contingent remainders cannot be destroyed by any act of the tenant for life ; and the Real Property Commissioners propose<sup>p</sup> to establish the same rule with respect to legal contingent remainders.

Proposed alteration of the Real Property Commissioners.

How contingent remainders may be transferred.

A contingent remainder is not transferrable at law, except by way of estoppel, and for this purpose a fine was usually employed, although a deed is sufficient.<sup>q</sup> But equity has not adopted this rule of law, and has allowed contingent remainders to be transferrable, or (which is the same thing) capable of being bound by contract. It is proposed to abolish this distinction, and to render them transferrable at law also.<sup>p</sup> Of course, *vested* re-

<sup>o</sup> See Moor. 486 ; 2 Roll. Abr. 797, pl. 12 ; 2 Sid. 159 ; 2 Chan. Rep. 170.

<sup>p</sup> Third Real Prop. Rep.

<sup>q</sup> *Doe v. Martyn*, 8 B. & C. 497 ; *Christmas v. Oliver*, 10 B. & C. 181 ; *Bensley v. Burdon*, 2 Sim. & Stu. 519 ; 2 B. & Ad. 278.



mainders may be transferred at present, as well at law as in equity.<sup>9</sup>

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons, upon which this nicety is founded. It were endless to attempt to enter upon the particular subtleties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament, Executory devises. (which being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice,) in these devises, I say, remainders may be created in some measure contrary to the rules before laid down as existing at common law: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

An executory devise is such a limitation of a future estate or interest in lands or chattels, What they are. (though in the case of chattels it is more properly an executory bequest,) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.<sup>r</sup>

It differs from a remainder at common law in three very material points: 1. That it needs not any particular estate to support it. 2. That by it a fee-simple or other less estate may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. Wherein they differ from a remainder. [ 173 ]

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commenc-

Executory devise without any particular estate to support it.

<sup>9</sup> See *post*, ch. 21.

<sup>r</sup> Fearn E. Dev. 386, 7th edit.

ing *in futuro*. This limitation would be void in a deed, which operated by virtue of the common law, (although it would be valid in a deed taking effect under the statute of uses,) but it is good at common law<sup>a</sup> in a will, by way of executory devise.<sup>4</sup> For, since by a devise a freehold may pass without corporal tradition or livery of seisin, (as it must do, if it passes at all,) therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* at common law, is the necessity of actual seisin, which always operates *in præsent*. And, since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.<sup>5</sup>

Executory  
devise limited  
after a fee.

2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to *A.* and his heirs; but if he dies before the age of twenty-one, then to *B.* and his heirs: this remainder, though void in a deed, which operates by virtue of the common law, (although valid, as we have seen, by way of springing use,) is good at common law by way of executory devise.<sup>6</sup> But in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors;<sup>7</sup> because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation,)<sup>8</sup> estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been

[ 174 ]  
Executory  
devises must  
be limited  
within a cer-  
tain time.

<sup>a</sup> Fonbl. Eq. vol. 2, p. 86.

<sup>4</sup> 1 Sid. 153.

<sup>5</sup> Cro. Jac. 593.

<sup>6</sup> 2 Mod. 289. See *ante*, p. 115.

<sup>7</sup> 12 Mod. 287; 1 Vern. 164.

<sup>8</sup> Salk. 229.

hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one-and-twenty years afterwards; and the ordinary period of gestation, where gestation exists; but where gestation does not exist, then for a life and lives in being and twenty-one years afterwards only; but this term of twenty-one years may be a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.\*

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not at law be done by deed; for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years.<sup>a</sup> And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place;<sup>b</sup> for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held,<sup>c</sup> that the devisee for life hath no power of aliening the term, so as to bar the remainder-man: yet, in order to prevent the danger of perpetuities, it was settled<sup>d</sup> that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be *in esse* during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest; and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee.<sup>e</sup> But Courts of Equity allow such limitations of a trust term, even in a deed.<sup>f</sup> And it should be here observed,

Executory  
devisees of  
terms of  
years.

[ 175 ]

Rules as to  
accumulations of rents  
and profits.

\* *Bengough v. Edridge*, 1 Sim. 267.  
*Cadell v. Palmer*, 10 Bing. 140.

<sup>a</sup> 8 Rep. 95.

<sup>b</sup> Bro. tit. *Chattels*, 28; *Dyer*, 74.

<sup>c</sup> *Dyer*, 358; 8 Rep. 96.

<sup>d</sup> 1 Sid. 451.

<sup>e</sup> *Skinn.* 341; 3 P. Wms. 358.

<sup>f</sup> *Warmestrey v. Tanfield*, 1 Cha. Rep. 16; *Massenburgh v. Ash*, 1 Vern. 234; 1 Fonbl. Eq. 214.

that by the 39 and 40 G. III. c. 98, it is enacted that no person shall, by any deed, will, or other mode, settle or dispose of any real or personal property so that the rents and profits may be wholly or partially accumulated for a longer term than the *life of the grantor, or the term of twenty-one years after the death of the grantor, or testator, the minority of any person who shall be living or en ventre sa mere, at the death of the grantor or the testator, or the minority of any persons who would be beneficially entitled to the profits under the settlement, if of full age.* All directions to accumulate rents or interest, beyond these periods are void, except for the purpose of paying debts, raising portions for children, or touching the produce of timber.<sup>5</sup>

Thus much for such estates in expectancy as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

Estates in  
reversion:  
what it is.

III. An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.<sup>6</sup> Sir Edward Coke<sup>1</sup> describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferrable, when actually vested, being both estates in *præsenti*, though taking effect in *futuro*.

The doctrine of reversions is plainly derived from the

<sup>5</sup> See *Thelusson v. Woodford*, 4 Ves. jun. 227; 11 Ves. 112.

<sup>6</sup> Co. Litt. 22.  
<sup>1</sup> Inst. 142.

feudal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death or the failure of issue male, the feud was determined and resulted [ 176 ] back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. <sup>Incidents of a reversion.</sup> When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident; though not inseparably so, to the reversion.<sup>k</sup> The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent, by *special* words: but by a *general* grant of the reversion the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is "*accessorium non ducit, sed sequitur, suum principale*."<sup>l</sup>

These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion,<sup>m</sup> to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done;<sup>n</sup> for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A., reserving rent, with reversion to B. and his heirs, B. hath a remainder descendible to his heirs general, and not a reversion to which

Reversions carefully distinguished from remainders.

<sup>k</sup> Co. Litt. 143.

<sup>l</sup> *Ibid.* 151, 152.

<sup>m</sup> Cro. Eliz. 321.

<sup>n</sup> 3 Lev. 407.

[ 177 ] the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A.'s estate.<sup>o</sup>

Tenants for life may be ordered to be produced.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann, c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of Chancery and order made thereupon) once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.<sup>p</sup>

The doctrine of merger.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate,<sup>q</sup> the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*) there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife.<sup>r</sup> An

<sup>o</sup> 1 And. 28.

<sup>p</sup> As to the course of proceeding under this act, see *in re Longen*, 12 Sim. 104.

<sup>q</sup> 3 Lev. 437.

<sup>r</sup> Plow. 413; Cro. Jac. 275; Co.

Litt. 388; but see 4 Leon. 37, and 3 Prest. Conv. pp. 273—278, who considers that the position here laid down should be qualified.

estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee: and the estate-tail, though a less estate, shall not merge in the fee.\* For estates-tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *de donis*: which operation and construction have probably arisen upon this consideration; that in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate.<sup>†</sup> But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it, and now can only do it by certain special modes, to be mentioned hereafter: "it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee; but immediately the issue can no longer be injured, as in tenancy in tail after possibility of issue extinct, the privilege from merger ceases, as also when the possibility of inheriting by the issue is done away with."<sup>‡</sup> It is now settled that one term of years may merge in another,<sup>§</sup> and as all terms of years are equal in the eye of the law, a term of 1000 years may merge in a term of one year, if the latter be the term in reversion. This doctrine is of much practical importance, particularly in marriage settlements, where terms of years are frequently created.

[ 178 ]  
Estate tail  
not liable to  
merger,

but on  
failure of  
issue, this  
privilege  
ceases.

One term of  
years may  
merge in  
another.

\* 2 Rep. 61 ; 8 Rep. 74.

† Cro. Eliz. 302.

‡ See *post*, ch. 22.

§ 3 Prest. Conv. 360—363.

§ *Hughes v. Robotham*, Cro. Eliz. 303 ; *Stephens v. Bridges*, 6 Mad. 66 ; and see 3 Prest. Conv. 183.

## CHAPTER THE FOURTEENTH.

[ 179 ] OF ESTATES IN SEVERALTY, JOINT-TENANCY,  
COPARCENARY, AND COMMON.

Estates may  
be held in  
severalty, in  
joint tenan-  
cy, in copar-  
cenary and  
in common.

WE come now to treat of estates, with respect to the number and connexions of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

I. Estates in  
severalty.

1. He that holds lands or tenements in *severalty* or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter; that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

II. Estates in  
joint-tenan-  
cy.

[ 180 ]

II. An estate in *joint-tenancy* is where lands or tenements are granted or devised to two or more persons, to hold in fee-simple, for life, for years, or at will. In consequence of such grant or devise an estate is called an estate in joint-tenancy,\* and sometimes an estate in

\* Litt. s. 277.



*jointure*, which word as well as the other signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint estate, which by virtue of the statute 27 Hen. VIII. c. 10, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.<sup>b</sup>

Blackstone lays it down, that lands may be granted to two or more persons as joint tenants in tail; but as he mentions afterwards, this cannot be unless the donees can lawfully intermarry. Thus if lands be limited to two men or two women in tail, as to John and Robert, and to the heirs of their bodies begotten; or to Ann and Mary, and the heirs of their two bodies begotten: John and Robert, in the one case, and Ann and Mary in the other, will have a joint estate for the term of their lives, and on the death of the survivor, the issue of each shall take a moiety of the lands.<sup>c</sup>

Who may be joint tenants in tail.

In unfolding this title, and the two remaining ones in the present chapter, we will first inquire, how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed* or *destroyed*.

1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

How joint-tenancy may be created.

2. The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity

The properties of joint-tenancy are derived from its unities, which are—

<sup>b</sup> See page 157.

182 b; *Cook v. Cook*, 2 Vern. 545,

<sup>c</sup> Litt. s. 283, s. 286; Co. Litt. cit. 2 P. Wms. 530, and *post*, p. 217.

of *title*, the unity of *time*, and the unity of *possession* : or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

1. Unity of interest.

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2. Unity of title.

3. Unity of time : in what estates it is necessary.

First, they must have one and the same *interest*. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different ; one cannot be tenant for life, and the other for years ; one cannot be tenant in fee, and the other in tail.<sup>d</sup> But, if land be limited to A. and B. for their lives, this makes them joint-tenants of the freehold ; if to A. and B. and their heirs, it makes them joint-tenants of the inheritance.\* If land be granted to A. and B. for their lives, and to the heirs of A. : here A. and B. are joint-tenants of the freehold during their respective lives, and A. hath an estate in fee in severalty : or, if land be given to A. and B., and the heirs of the body of A. ; here both have a joint estate for life, and A. hath an estate in tail.<sup>f</sup> Secondly, joint-tenants must also have an unity of *title* : their estate must be created by one and the same act, whether legal or illegal ; as by one and the same grant, or by one and the same disseisin.<sup>g</sup> Joint-tenancy cannot arise by descent or act of law ; but merely by purchase, or acquisition by the act of the party ; and, unless that act be one and the same, the two tenants would have different titles ; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, when the estates take effect under the common law, there must also be an unity of *time* : their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B. ; or a remainder in fee to A. and B. after a particular estate ; in either case A. and B. are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B. ; and during the continuance of the particular estate A. dies, which

<sup>d</sup> Co. Litt. 188.

<sup>e</sup> Litt. s. 277.

<sup>f</sup> Litt. s. 285. Co. Litt. 184 b.

<sup>g</sup> *Ibid.* s. 278.

vests the remainder of one moiety in his heir; and then B. dies, whereby the other moiety becomes vested in the heir of B.: now A.'s heir and B.'s heir, are not joint-tenants of this remainder but tenants in common; for one moiety vested at one time, and the other moiety vested at another.<sup>b</sup> But unity of time is not a necessary incident to estates taking effect under the Statute of Uses, or by executory devise. In these estates the seisin will remain in the releasee to uses, or the heir at law until the uses arise. Thus where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for the term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times; because the use of the wife's estate remained in the releasee to uses till the intermarriage; and then had a relation back, and took effect from the original time of creation. Thus also lands were limited to the following uses, to A. and B. his wife, for their lives, remainder to their first and other sons in tail, remainder to the issues female of their bodies begotten. A. had two daughters, Anne and Martha. Martha died without issue, and afterwards Anne died. And it was held that Anne and Martha took as joint-tenants for life, with several inheritances, and the time of vesting was thought unimportant.<sup>k</sup> And in a subsequent case Lord Thurlow held that the vesting of the estate at different times would not prevent joint-tenancy.<sup>l</sup> Lastly, in joint-tenancy there must be an unity of possession. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*; that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*.<sup>m</sup> They have not one of them a seisin of one half or moiety, and the other of the other half or moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the

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Unity of  
possession.<sup>b</sup> Co. Litt. 188.

1172.

<sup>l</sup> Dyer, 340; 1 Rep. 101.<sup>l</sup> *Stratton v. Best*, 2 Bro. C. C. 233;<sup>k</sup> *Earl of Sussex v. Temple*, 1 Lord Raym. 310; *Oates v. Jackson*, 2 Stra.and see *Mogg v. Mogg*, 1 Meriv. 654.<sup>m</sup> Litt. s. 288; 5 Rep. 10.

Tenancy by  
entirety.

whole of an undivided moiety.<sup>a</sup> And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.<sup>o</sup>

Conse-  
quences of  
the unity of  
possession of  
joint-te-  
nants.

Upon these principles of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenants' estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both in respect of the joint reversion.<sup>p</sup> If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity or relation of their estate.<sup>q</sup> On the same reason, livery of seisin, made to one joint-tenant shall enure to both of them;<sup>r</sup> and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both.<sup>s</sup>

Possession of  
one joint-te-  
nant, not  
now the pos-  
session of all.

In all actions also, relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other;<sup>t</sup> and, until very recently, the possession of one joint-tenant was the possession of the other, or others, but this is altered by the 3 and 4 W. IV., c. 27, s. 12, by which it is enacted, that when any one or more of several persons entitled to any land or rents as joint-tenants, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to be the possession or receipt of or by such person or persons or any of them. But if two or

<sup>a</sup> *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatum per se.* Bract. l. 5, tr. 5, c. 26.

<sup>o</sup> Litt. s. 685; Co. Litt. 187; Bro. Abr. tit. *Cui in vita*. 8; 2 Vern. 120;

2 Lev. 39.

<sup>p</sup> Co. Litt. 214.

<sup>q</sup> *Ibid.* 192.

<sup>r</sup> *Ibid.* 49.

<sup>s</sup> *Ibid.* 319, 364.

<sup>t</sup> *Ibid.* 195.

more joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either, because neither joint-tenant hath a several right of patronage, but each is seised of the whole; and, if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed: which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse; and if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate.<sup>a</sup> Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land,<sup>b</sup> for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases or to grant copyholds;<sup>c</sup> and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the Statute of Westm. 2, c. 22.<sup>d</sup> So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver,<sup>e</sup> yet now by the statute 4 Ann, c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy, or, as is now more usual, may file a bill in equity for an account.<sup>f</sup>

From the same principle also arises the remaining grand incident of joint estates: *viz.* the doctrine of *survivorship*: by which when two or more persons are seised of a joint estate, of inheritance, for their own lives, or *per auter vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it

The doctrine of survivorship.

<sup>a</sup> Co. Litt. 185.

<sup>b</sup> 3 Leon. 262.

<sup>c</sup> 1 Leon. 234.

<sup>d</sup> 2 Inst. 403.

<sup>e</sup> Co. Litt. 200.

<sup>f</sup> *Lorimer v. Lorimer*, 5 Mad. 363.

[ 184 ] be, whether an inheritance or a common freehold only, or even a less estate.<sup>b</sup> This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other, but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest, which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors<sup>c</sup> the *jus accrescendi*, because the right, upon the death of one joint-tenant, accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstitibus de persona in personam usque ad ultimam superstitem.*" "And this *jus accrescendi*," says Blackstone, "ought to be mutual, which I apprehend to be one reason why neither the King,<sup>d</sup> nor any corporation,<sup>e</sup> can be a joint tenant with any private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship: for the King and

<sup>b</sup> Litt. s. 280, 281.

<sup>d</sup> Co. Litt. 181 b, 190; Finch. L.

<sup>c</sup> Bract. l. 4, tr. 3, c. 9, sec. 3; 83.

Fleta. b. 3, c. 4.

<sup>e</sup> 2 Lev. 12.

the corporation can never die." But this seems to be a mistake, as the right of survivorship need not be mutual; and Lord Coke expressly lays it down that there may be joint-tenants, though there be not equal benefit of survivor, on both sides of which he gives several instances.<sup>f</sup>

3. We are, lastly, to enquire, how an estate in joint-tenancy may be *severed* and *destroyed*. And this may be done by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed.<sup>g</sup> By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do:<sup>h</sup> for, this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint tenants, either of inheritances or other less estates, were compellable by writ of partition to divide their lands.<sup>i</sup> However, by the 3 & 4 W. IV. c. 27, s. 36, no writ of partition shall be brought after the 31st of December, 1834; and before the writ was thus abolished, the usual mode of enforcing a partition which

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How joint-tenancy may be destroyed.

<sup>f</sup> Co. Litt. 181 b, 193 a, and Dy. 10 b.

<sup>g</sup> Co. Litt. 188, 198.

<sup>h</sup> Litt. s. 290.

<sup>i</sup> Thus, by the civil law, *nemo invitus compellitur ad communionem*.

(Ff. 12, 6, 26, sec. 4.) And again: *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant: hoc judicium inter eos accipi potest.* (Ff. 10, 3, 8.)

is now the only mode, was by bill in equity, praying that a commission may issue, under which a partition may be effected.<sup>j</sup> 3. The jointure may be destroyed by destroying the unity of *title*. As, if one joint-tenant alien and conveys his estate to a third person, here the joint-tenancy is severed, and turned into tenancy in common ;<sup>k</sup> (and in equity a covenant to convey for a valuable consideration will be sufficient,<sup>l</sup>) for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent grantor,) though till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure : for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other<sup>m</sup>) is already vested.<sup>n</sup> 4. It may also be destroyed, by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure :<sup>o</sup> though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance ; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger) but branches of one entire estate.<sup>p</sup> In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure ;<sup>q</sup> for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it.<sup>r</sup> Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship :<sup>s</sup> and, if one of three joint-tenants releases

<sup>j</sup> See Private Wrongs, ch. 29.

<sup>k</sup> Litt. s. 292.

<sup>l</sup> *Brown v. Raindle*, 3 Ves. 257.

<sup>m</sup> *Jus accrescendi præfertur ultimæ voluntati*. Co. Litt. 185.

<sup>n</sup> Litt. s. 287. See *post*, ch. 25.

<sup>o</sup> Cro. Eliz. 470.

<sup>p</sup> 2 Rep. 60 ; Co. Litt. 182.

<sup>q</sup> Litt. s. 302, 303.

<sup>r</sup> *Nihil de re accrescet ei, qui nihil in re quando jus accresceret habet*. Co. Litt. 188.

<sup>s</sup> Litt. s. 294.



his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure;<sup>†</sup> for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, an undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

In general it is advantageous for the joint-tenants to [ 187 ] dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes however it is disadvantageous to dissolve the joint estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives, and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety.<sup>‡</sup> And therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companions, it is a forfeiture:<sup>¶</sup> for in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate;<sup>\*</sup> for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

Advantages and disadvantages of dissolving the jointure.

III. An estate held in *coparcenary* is, where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law, or particular custom. By common law; as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit,

III. Estates in coparcenary.

<sup>†</sup> Litt. s. 304.

<sup>‡</sup> 1 Jones, 55.

<sup>¶</sup> 4 Leon. 237.

<sup>\*</sup> Co. Litt. 252.

as will be more fully shewn, when we treat of descents hereafter: and these co-heirs are then called *coparceners*; or, for brevity, *parceners* only.<sup>7</sup> Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c.<sup>8</sup> And, in either of these cases, all the parceners put together make but one heir; and have but one estate among them.<sup>9</sup>

[ 188 ] The *properties* of parcener are in some respects like those of joint-tenants; they having the same unities of *interest, title, and possession*. They may sue and be sued jointly for matters relating to their own lands;<sup>b</sup> and the entry of one of them shall in some cases enure as the entry of them all.<sup>c</sup> They cannot have an action of trespass against each other; but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste;<sup>d</sup> for coparceners could at all times put a stop to any waste by writ of partition; but till the statute of Henry VIII. joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants:<sup>e</sup> and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee, but for life and years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners;<sup>f</sup> the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an unity, have not an entirety, of interest. They are properly entitled each to the

Properties of  
coparcenary.

In what par-  
ceners differ  
from joint-  
tenants.

<sup>7</sup> Litt. s. 241, 242.

<sup>8</sup> *Ibid.* s. 265.

<sup>9</sup> Co. Litt. 163.

<sup>b</sup> *Ibid.* 164.

<sup>c</sup> Co. Litt. 188, 243.

<sup>d</sup> 2 Inst. 403.

<sup>e</sup> Litt. s. 254.

<sup>f</sup> Co. Litt. 164, 174.

whole of a distinct moiety;<sup>5</sup> and of course there is no *jus accrescendi*, or survivorship between them; for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed [ 189 ] by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*. By the 3 & 4 W. IV. c. 27, s. 12, the same provision is made with respect to the possession of one coparcener, as has already been mentioned with respect to that of a joint-tenant.<sup>1</sup>

Parceners are so called, saith Littleton,<sup>2</sup> because they may be constrained to make *partition*. And he mentions many methods of making it;<sup>3</sup> four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger.<sup>4</sup> And the reason given is that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio*. The fourth method is where the

Mode of  
effecting a  
partition.

<sup>5</sup> Co. Litt. 163, 164.

<sup>2</sup> Litt. s. 369.

<sup>3</sup> See *ante*, p. 218.

<sup>2</sup> Litt. s. 241.

<sup>1</sup> Sec. 243 to 264.

<sup>4</sup> Co. Litt. 166; 8 Rep. 22.

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What is not  
capable of  
partition.

sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion was, where one or more sued out a writ of partition against the others ; but as we have seen, the writ of partition is now abolished, and the mode of enforcing a partition is by bill in equity.<sup>a</sup> There are some things which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided ; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance : or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson.<sup>c</sup>

Where one  
coparcener  
has an estate  
in frankmar-  
riage.

There is yet another consideration attending the estate in coparcenary ; that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which we may remember was a species of estate-tail, freely given by a relation for advancement of his kinswoman in marriage,<sup>p</sup>) in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending.<sup>q</sup> This mode of division was known in the law of the Lombards : which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum*. With us it is denominated bringing those hands into *hotchpot* :<sup>r</sup> which term I shall explain in the very words of Littleton :<sup>s</sup> “ it seemeth that this word, *hotchpot*, is in English a pudding : for in a pudding is not commonly put one thing alone, but one thing with other things together.” By this housewifely metaphor our ancestors meant to inform us,<sup>t</sup> that the lands, both those given in frankmarriage and those

<sup>a</sup> See *ante*, 228.

<sup>b</sup> Co. Litt. 164, 165.

<sup>c</sup> See page 138.

<sup>q</sup> Bracton, l. 2, c. 34 ; Litt. s. 266 to 278.

<sup>r</sup> L. 2, t. 14, c. 15.

<sup>s</sup> Britton, c. 72.

<sup>t</sup> Sec. 267.

<sup>u</sup> Litt. s. 268.

descending in fee-simple, shall be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage; and if she did not chuse to put her lands into hotchpot, she was presumed to be sufficiently provided for, and the rest of the inheritance was [ 191 ] divided among her other sisters. The law of hotchpot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotchpot.<sup>1</sup> And the reason is, because lands descending in fee-simple are distributed by the policy of the law, for the maintenance of all the daughters; and, if one has a sufficient provision out of the same inheritance, equally to the rest, it is not reasonable that she should have more: but lands, descending in tail are not distributed by the operation of the law, but by the designation of the giver, per formam doni; it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotchpot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage-portion.<sup>2</sup> And therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotchpot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.<sup>3</sup> How coparcenary may be dissolved.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.<sup>4</sup> This tenancy therefore happens, where IV. Tenants in common.

<sup>1</sup> Litt. s. 274.

<sup>2</sup> *Ibid.* 275.

<sup>3</sup> As to the effect of a dissolution of

a coparcenary estate, see *Doe v. Dixon*, 5 Ad. & E. 389.

<sup>4</sup> Litt. s. 292.

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there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday, so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

How tenancy  
in common  
may be  
created.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed or will. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest. As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, and the alienee by the new alienation;<sup>a</sup> and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles, and conveyances.<sup>b</sup> If one of two parceners alienes, the alienee and the remaining parcener are tenants in common:<sup>c</sup> because they hold by different titles, the parcener by descent, the alienee by purchase. So, likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a *man and woman*, and the heirs of their bodies begotten:<sup>d</sup>

<sup>a</sup> Litt. s. 293.

<sup>b</sup> *Ibid.* 295.

<sup>c</sup> *Ibid.* 309.

<sup>d</sup> *Ibid.* 288.

and in this and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heirs of A., and the other as heir of B.; and those too not titles by purchase, but descent. In short, when- [ 193 ] ever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed or will: but here care must be taken not to insert words which imply a joint-estate; and then if lands be given to two or more, and if it be not joint-tenancy, it must be a tenancy in common. The law at one time favoured joint-tenancy rather than tenancy in common;<sup>a</sup> but this favour has of late been losing ground even at law,<sup>f</sup> and in courts of equity the leaning is decidedly towards tenancy in common.<sup>g</sup> Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common;<sup>h</sup> and, if one grants to another *half* his land, the grantor and grantee are also tenants in common;<sup>i</sup> because, as has been before<sup>k</sup> observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy;<sup>l</sup> because that is necessarily implied in the word “jointly,” the word “severally” perhaps only implying the power of partition; and an estate given to A. and B., *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy,<sup>m</sup> (for it implies no more than the law has annexed to that estate, *viz.* divisibility)<sup>n</sup> yet in *wills* it is

How tenancy in common may be created.

<sup>a</sup> Salk. 392.

<sup>f</sup> *Staples v. Maurice*, 4 B. C. C. 580, arg. *Hawes v. Hawes*, 1 Wils. 165.

<sup>g</sup> *Lake v. Cradock*, 3 P. Wms. 158; *Aveling v. Knipe*, 10 Ves. 44; *Rigden v. Vallier*, 2 Ves. sen. 258; *Mor-*

*ley v. Bird*, 3 Ves. 681.

<sup>h</sup> Litt. s. 298.

<sup>i</sup> *Ibid.* 299.

<sup>k</sup> See page 216.

<sup>l</sup> Poph. 52.

<sup>m</sup> 1 Equ. Cas. Abr. 291.

<sup>n</sup> 1 P. Wms. 17.

certainly a tenancy in common :<sup>o</sup> because the divisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in  
 [ 194 ] common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A. and B., to hold *as tenants in common, and not as joint-tenants.*

Incidents of  
tenancy in  
common.

As to the *incidents* attending a tenancy in common ; tenants in common (like joint-tenants) were compellable by the statutes of Henry VIII. before mentioned,<sup>p</sup> and now by bill in equity, to make partition of their lands ; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest ; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession : and are therefore the same as appertain to joint-tenants merely upon that account : such as being liable to reciprocal actions of waste, and of account ; by the statute of Westm. 2. c. 22, and 4 Ann, c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate ;<sup>q</sup> though, if one actually turns the other out of possession, an action of ejectment will lie against him.<sup>r</sup> But as for other incidents of joint-tenants, which arise from the privity of the title, or the union and entirety of interest, (such as joining or being joined in actions,<sup>s</sup> unless in the case where some entire or indivisible thing is to be recovered,)<sup>t</sup> these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several. By the 3 and 4 W. IV. c. 27, s. 12, the same provision is made with respect to the possession of one tenant in common, as has already been mentioned with respect to that of a joint-tenant.<sup>u</sup>

<sup>o</sup> 3 Rep. 39 ; 1 Ventr. 32.

<sup>p</sup> Page 208.

<sup>q</sup> Co. Litt. 199.

<sup>r</sup> *Ibid.* 200.

<sup>s</sup> Litt. s. 311.

<sup>t</sup> Co. Litt. 197.

<sup>u</sup> See *ante*, p. 218, and see as to the construction of this clause *Doe d. Calley v. Taylerson*, 3 Per. & Dav. 539.



Estates in common can only be *dissolved* two ways. 1. How tenancy in common may be dissolved. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making a partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession. And this finishes our enquiries with respect to the nature of *estates*.

## CHAPTER THE FIFTEENTH.

### [ 195 ] OF THE TITLE TO REAL PROPERTY IN GENERAL.

The title to things real. THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein ; I come now to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

Definition of a title. A title is thus defined by Sir Edward Coke,<sup>a</sup> *titulus est justa causa possidendi id quod nostrum est* ; or, it is the means whereby the owner of lands hath the just possession of his property.

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

The lowest title is naked possession. 1. The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate ; without any apparent right, or any shadow or pretence of right, to hold and continue such possession.

This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands ; which is termed a *disseisin*, being a deprivation of that actual seisin, or corporal freehold of the lands which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the

Disseisin : what it is. [ 196 ] entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal

<sup>a</sup> 1 Inst. 345.

remedies.<sup>b</sup> But in the mean time, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

II. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseised, or otherwise kept out of possession by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right of possession*; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus if the disseisor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to the heir; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised, and it was not lawful for the person disseised to divest this apparent right by mere entry or other act of his own, but only by an action at law.<sup>c</sup> For, until the contrary was proved by legal demonstration, the law would rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feudal duties and services:<sup>d</sup> and therefore, when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow soldiers and fellow tenants, the peers of the feudal court. But if he, who has

The right of possession.

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<sup>b</sup> See Private Wrongs, *passim*.

<sup>d</sup> Gilb. Ten. 18.

<sup>c</sup> Litt. a. 385.

the actual right of possession, puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession to which he hath such actual right. And it has very recently been enacted that no descent cast or discontinuance which shall have happened after the 31st day of December, 1833, shall defeat any right of entry for the recovery of land.<sup>e</sup> Yet if he who has the actual right of possession omits to bring his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the others' negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of: *viz.*

The rights of property.

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III. The mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally divested, and *put to a right*.<sup>f</sup> A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession: for the law presumes that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without enquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right he may at length recover the lands. Again, if a tenant

<sup>e</sup> 3 & 4 W. 4, c. 17, s. 39.

<sup>f</sup> Co. Litt. 345.

in tail discontinued his estate-tail, by alienating the lands to a stranger in fee, and died; there the issue in tail had by the common law no right of *possession*, independent of the right of *property*: for the law presumed *prima facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and had transferred the same to a stranger, the law would not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. The heir therefore in that case had only a *mere right*, and was strictly held to the proof of it, in order to recover the lands. But the right of entry, as we have seen, will not now be taken away by the discontinuance of the tenant in tail.<sup>5</sup> Lastly, if by accident, neglect, or otherwise, judgment was given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested,) and the other party had indeed in himself the right of property, that was then turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he should recover his seisin of the lands. But a writ of right is now abolished by the 3 & 4 Will. IV. c. 27, s. 36, and by the same act, (s. 2,) one period of limitation is established for all lands and rents, it being enacted that after the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same. Persons under the disabilities of infancy, lunacy, coverture, or beyond seas, and their representatives, are allowed ten years from the termination of their disability or death (s. 16); but no entry, action, or distress, shall be brought beyond forty years after the right of action accrued (s. 17).

<sup>5</sup> See *ante*, p. 234.

Thus, if a disseissor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseissor dies, and the lands descend to his son, the son gains an *apparent right of possession*; but I still retain the *actual right* both of *possession* and *property*. If before the act referred to came into operation, I acquiesced for thirty years, without bringing any action to recover possession of the lands, the son gained the *actual right of possession*, and I retained nothing but the *mere right of property*. And even this right of property would fail, or at least it would be without a remedy, unless I pursued it within the space of sixty years; and now of twenty, or it may be forty years. So also if the father before the 31st of December, 1833, were tenant in tail, and aliened the estate-tail to a stranger in fee, the alienee thereby gained the *right of possession*, and the son had only the *mere right*, or *right of property*. And hence it followed that one man might have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant in tail infeoffed A. in fee-simple, and died, and B. disseised A.; B. had the *possession*, A. the *right of possession*, and the issue in tail the *right of property*: A. might recover the possession against B.; and afterwards the issue in tail might evict A., and unite in himself the possession, the right of possession, and also the right of property; in which union consists—

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IV. A complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law,<sup>b</sup> that no title is completely good, unless the right of possession be joined with the right of property: which right is then denominated a double right, *jus duplicatum*, or *droit droit*.<sup>1</sup> And when to this double right the actual possession is also united, when there is, according to the expression of Fleta,<sup>k</sup> *juris et seisinæ conjunctio*, then, and then only, is the title completely legal.

It should be observed that throughout this chapter the actual possession of the lands, means either the personal possession of the tenant, or that of his tenant for years or at will.

<sup>b</sup> Mirr. l. 2, c. 27.

<sup>1</sup> L. 3, c. 15, s. 5.

<sup>k</sup> Co. Litt. 266; Bract. l. 5, tr. 7, c. 5.

## CHAPTER THE SIXTEENTH.

## OF TITLE BY DESCENT.

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THE several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners in which this complete title (and therein principally the right of *property*) may be reciprocally lost and acquired: whereby the dominion of things real is either continued or transferred from one man to another. And here we must first of all observe that (as gain and loss are terms of relation and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned his estate by his death; where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages: and so, in case of forfeiture, the tenant by his own misbehaviour or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default: and, in alienation by common assurances, the two considerations of loss and acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee.

[ 201 ] The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: which are thus laid down by Lord Coke,<sup>a</sup> descent, where the title is vested in a man by the single operation of law; and purchase, where the title is vested in him by his own act or agreement; but, as will be seen, the title by descent is now much narrowed.

Descent, definition of.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate, so descending to the heir, is in law called the inheritance.

The person last entitled to the lands shall be considered the purchaser thereof, unless it shall be proved that he inherited the same.

And it has recently been enacted,<sup>b</sup> by s. 2, that in every case arising on descents after the 31st of December, 1833, descent shall be traced from the purchaser, the "purchaser," meaning by s. 1, the person who last acquired the land otherwise than by descent or than by escheat, partition, or inclosure, by the effect of which the land shall have become part of, or descendible in the same manner as other land, acquired by descent; and, by s. 2, to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the lands shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same. By the former law, if a man devised lands to a person who was his next heir and his heirs, the devise was void, and the heir took by descent.<sup>c</sup> But by 3 & 4 W. IV. c. 106, s. 3, it is enacted

When land shall be devised to the

<sup>a</sup> Co. Litt. 18.

<sup>b</sup> 3 & 4 W. 4, c. 106, s. 2. See, as to the construction of this clause, *Doe d. Blackburn v. Blackburn*, 1

*Moo. & Rob. 547, and post, ch. 17.*

<sup>c</sup> Dy. 124, pl. 38, 354, pl. 33; *Plowd. 545.*



that when any land shall have been devised by any testator, who shall die after the 31st of December, 1833, to the heir or person who shall be the heir of the testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited by any assurance executed after the 31st of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to have been entitled thereto as his former estate.

And further, (by s. 4,) when any person shall have acquired any land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the 31st day of December, 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator, who shall depart this life after such day; then such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the *purchaser* of such land. It will be seen therefore that the title by descent is now much narrowed.

The doctrine of descents, or law of inheritance in fee-simple, is still, however, a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his

heir of the testator, he shall be considered to have acquired the land as devisee.

When heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

Importance of the doctrine of descents.

heir; this is a point, that we must result back to the standing law of descents in fee-simple to be informed of.

[ 202 ] In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour to lay

What it is to be treated of in this chapter.

aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs, reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents, into those by *custom*, *statute*, and *common law*: for descents by *particular custom*, as to all the sons in gavelkind, and to the youngest in borough English, have already been often<sup>d</sup> hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by *statute* or fees tail *per formam doni*, in pursuance of the statute of Westminster the second, have also been already<sup>e</sup> copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance; which, and which only, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance of blood.

Consanguinity, definition of. Is either lineal or collateral.

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*:" the connexion or relation of persons descended from the same stock or common ancestor. The consanguinity is either lineal or collateral.

[ 203 ] Lineal consanguinity is that which subsisted between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line: or between John Stiles and his son, grandson, great-

Lineal consanguinity, what it is.

<sup>d</sup> See *ante*, pp. 83, 84; and Rights of Persons, [74], [75].

<sup>e</sup> See p. 130.

grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards; the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and his grandson in the second; his great grandsire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil,<sup>f</sup> and canon,<sup>g</sup> as in the common law.<sup>h</sup>

What constitutes a degree.

This doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees: and so many different bloods<sup>i</sup> is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother: he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate.<sup>k</sup> The lineal consanguinity, we may observe, falls [ 204 ]

<sup>f</sup> Ft 38, 10, 10.

<sup>g</sup> *Decretal*, l. 4, tit. 14.

<sup>h</sup> *Co. Litt.* 23.

<sup>i</sup> *Ibid.* 12.

<sup>k</sup> This will seem surprising to those who are unacquainted with the increasing power of progressive numbers: but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also 2: or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first degree; the number of whom is doubled at every remove, because each of our ancestors has also two immediate ancestors of his own.

<i>Lineal Degrees.</i>	<i>Number of Ancestors.</i>
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768

strictly within the definition of *vinculum personarum, ab eodem stipite descenditum*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Collateral  
consanguin-  
ity.

[ 205 ] Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from the one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related; why? because both are derived from one father: *Titius* and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are

<i>Lineal Degrees.</i>	<i>Number of Ancestors.</i>
16 —————	65536
17 —————	131072
18 —————	262144
19 —————	524288
20 —————	1048576

A shorter method of finding the number of ancestors at any even degree is

by squaring the number of ancestors at half that number of degrees. Thus, 16 (the number of ancestors at four degrees) is the square of 4, the number of ancestors at two; 256 is the square of 16; 65536 of 256; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions.

in some degree related to each other. For indeed, if we only suppose each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more, (and, without such a supposition, the human species must be daily diminishing,) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more.<sup>1</sup> And, if this calculation should appear incompatible with the number of [ 206 ]

<sup>1</sup> This will swell more considerably than the former calculation: for here, though the first term is but 1, the denominator is 4; that is, there is one kinsman (a brother) in the first degree, who makes, together with the *propositus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it. For, since each couple of ancestors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards; but we have seen that the ancestors increase upwards in a duplicate *ratio*; therefore the descendants must increase downwards in a double duplicate, that is, in a quadruple *ratio*.

<i>Collateral Degrees.</i>	<i>Number of Kindred.</i>
1 —————	1
2 —————	4
3 —————	16
4 —————	64
5 —————	256
6 —————	1024
7 —————	4096
8 —————	16384
9 —————	65536
10 —————	262144
11 —————	1048576

<i>Collateral Degrees.</i>	<i>Number of Kindred.</i>
12 —————	4194804
13 —————	16777216
14 —————	67108864
15 —————	268435456
16 —————	1078741824
17 —————	4294967296
18 —————	17179869184
19 —————	68719476736
20 —————	274877906944

This calculation may also be formed by a more compendious process, *vis.* by squaring the couples, or half the number of ancestors, at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account; that is, whether, on an average, every man has not one brother or sister, four first cousins, sixteen second cousins, and so on; we shall find that the present calculation is very far from being overcharged.

inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

Method of  
computing  
degrees.

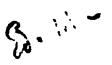
[ 207 ]

The method of computing these degrees in the canon law,<sup>m</sup> which our law has adopted,<sup>n</sup> is as follows. We begin at the common ancestor and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus *Titius* and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz. his own grandfather, the father of *Titius*. Or, (to give a more illustrious instance from our English annals,) King Henry the seventh, who slew Richard the third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity represent King Richard the third, and the class marked (e) King Henry the seventh. Now their common stock or ancestor was King Edward the third, the *abavus* in the same table; from him to Edmond Duke of York, the *proavus*, in one degree; to Richard Earl of Cambridge, the *avus*, two; to Richard Duke of Yorke, the *pater*, three: to King Richard the third, the *propositus*, four; and from King Edward the third to John of Gant (a) in one degree; to John Earl of Somerset (b) two; to John Duke of Somerset (c) three: to Margaret Countess of Richmond (d) four; to King Henry the seventh (e) five. Which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending,) these two princes were related in the ninth degree; for from King Richard

<sup>m</sup> Decretal, 4, 14, 3 & 9.

<sup>n</sup> Co. Litt. 23.

*OF CONSANGUINITY.*







the third to Richard Duke of York is one degree; to Richard Earl of Cambridge, two; to Edmond Duke of York, three; to King Edward the third, the common ancestor, four; to John of Gant, five; to John Earl of Somerset, six; to John Duke of Somerset, seven; to Margaret Countess of Richmond, eight; to King Henry the seventh, nine.

The nature and degree of kindred being thus in some [ 208 ] measure explained, I shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; remarking their origin and progress, and the reasons upon which they are founded, and in some cases their agreement with the laws of other nations; together with an explanatory comment, having reference to the table which will be found at the end of the chapter; and in applying these rules or canons, it will be of importance to bear in mind that the legislature has recently made considerable alterations in the law of descent, which, however, do not extend to any descent which has taken place on the death of any person who died before the first day of January, 1834.\* With respect to these, therefore, the former rules obtain, and must regulate all titles anterior to the period mentioned. We shall now first mention the old rules, and where they have been altered, and afterwards state the new ones.

Recent alterations in the law of descent by the 3 & 4 W. IV. c. 106.

1. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, in infinitum, and under the former law they could never lineally ascend; but this, as we shall see, is now altered.

1. Inheritances shall lineally descend.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another till the ancestor is previously dead. *Nemo est hæres viventis*. Before that time the person

*Nemo est hæres viventis.*

\* See the table of consanguinity annexed; wherein all the degrees of collateral kindred to the *propositus* are computed, so far as the tenth of the civilians, and the seventh of the

canonists inclusive; the former being distinguished by the numeral letters, the latter by the common ciphers.

P 3 & 4 W. 4, c. 106, s. 11.

Heir apparent and heir presumptive, definition of.

who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor, as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son.<sup>1</sup>

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The rule *seisin facit stipitem*, to what titles it now extends.

Under the former law no person could be properly such an ancestor, as that an inheritance of lands or tenements could be derived from him, unless he had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold; or unless he had had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson,<sup>2</sup> and the like. But he could not be accounted an ancestor, who had had only a bare right or title to enter or be otherwise seised. And therefore all the cases, under the former law, which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is claimed) was the last person actually seised thereof. For the law required this notoriety of possession, as evidence that the ancestor had that property in himself, which was to be transmitted to his heir. Which notoriety had succeeded in the place of the ancient feudal investiture, where-

<sup>1</sup> Bro. tit. Descent, 58. See *ante*, p. 201.

82 a; and 8 Rep. 42 a; Hargr. note, 83; 7 T. R. 390; 8 T. R. 218.

<sup>2</sup> Co. Litt. 15. But see Co. Litt.

<sup>3</sup> *Ibid.* 11.

by, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland) and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers; till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which if disputed was afterwards to be tried by those peers) or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin, therefore, of any person, thus understood, made him the root or stock, from which all future inheritance by right of blood must have been derived, which was very briefly expressed in this maxim, *seisina facit stipitem*.<sup>1</sup>

And this is still the law with respect to descents which have taken place on the deaths of persons who have died before the 1st day of January 1834. But with respect to descents which take place on deaths after that period, the law has been entirely altered by the 3 & 4 W. IV. c. 106, for in the first place it is enacted, (s. 1.) that in the construction of that act, the expression "person last entitled to land," shall extend to the last person who had a right thereto, whether he did or did not obtain possession or receipt of the rents and profits thereof; and, (s. 2.) that such "person last entitled," shall be considered to have been the purchaser. This, as we have already seen,<sup>2</sup> will greatly shorten the investigation in this respect; on titles by descent after 1834.

When however a person dies so seised or entitled, as [ 210 ] the case may be, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey; to whom by the former law, grounded on

By the former law, the land descended but never ascended.

<sup>1</sup> *Flet.* l. 6, c. 2, s. 2. It is to be observed, that even under the former law this rule does not apply to a person claiming by descent under a devise of a person actually seised,

although such devisee never had actual seisin. *Doe d. Parker v. Thomas*, 4 Scott, N. S. 449.

<sup>2</sup> Stated fully, *ante*, p. 238.

the rules of the feudal tenures, the land never ascended, but rather escheated to the lord.<sup>v</sup>

This rule, so far as it is affirmative, and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all other ancestors from succeeding to the inheritance of their offspring, was peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother.<sup>x</sup> And, by the laws of Rome, in the first place the children or lineal descendants were preferred; and, on failure of these, the father and mother or lineal descendants succeeded together with the brethren and sisters;<sup>y</sup> though by the law of the twelve tables the mother was originally, on account of her sex, excluded.<sup>z</sup> Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice.<sup>a</sup> Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

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Reasons for  
exclusion of  
the ascend-  
ing line.

We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which the land, by the law of nature would again become common, and liable to be seized by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and

<sup>v</sup> Litt. s. 3.

<sup>x</sup> Inst. 3, 3, 1.

<sup>z</sup> Selden *de success. Ebraeor.* c. 12.

<sup>a</sup> Oraig. *de sur. feud.* l. 2, t. 13, s.

<sup>y</sup> Ff. 38, 15. 1 Nov. 118, 127.

15. Locke on Gov. part 1, s. 90.

successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of the feudal tenures. For it was an express rule of the feudal law,<sup>b</sup> that *successionis feudi talis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtained until lately in the French law.<sup>c</sup> Our Henry the First, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line:<sup>d</sup> but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law,<sup>e</sup> that *hereditas nunquam ascendit*; which has remained an invariable maxim until very lately. These circumstances evidently show this rule to be of feudal original; and taken in that light, there are some arguments in its favour, besides those which are drawn merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feudal constitutions:<sup>f</sup> which was founded as well upon the personal

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<sup>b</sup> 2 Feud. 50.

<sup>c</sup> Domat. p. 2, l. 2, t. 2. Montesqu. Esp. L. l. 31, s. 38. This is now altered. See Code Civil, l. 3, tit. 1, 746.

<sup>d</sup> LL. Hen. 1, c. 70. As to the

Saxon law in this respect, see 2 Hall. Mid. A. 467.

<sup>e</sup> l. 7, c. 1.

<sup>f</sup> 1 Feud. 20.

merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud; and therefore could not go to the father, because, if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory, than that quaint one of Bracton,<sup>a</sup> adopted by Sir Edward Coke,<sup>b</sup> which regulates the descent of lands according to the laws of gravitation.

but this rule is now altered, and the lineal ancestor succeeds after the issue of the purchaser.

This rule has however been altered with respect to descents on deaths on or after the 1st of January, 1834, it being enacted, by stat. 3 & 4 W. IV. c. 106, s. 6, that every lineal ancestor shall be capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. But (by s. 7) it is provided that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting

<sup>a</sup> *Descendit itaque jus, quasi ponderosum quid cadens deorsum recta linea, et nunquam reascendit ea viâ qua de-*

*scendit*, l. 2, c. 29.

<sup>b</sup> 1 Inst. 11.

until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person nor any of her descendants shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed. And this brings us to the second rule or canon.

II. Which is, that the male issue shall be admitted before the female; and this rule remains unaltered by the recent act.<sup>1</sup>

II. The male issue shall be admitted before the female.

Thus sons shall be admitted before daughters; or as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred.<sup>2</sup> As if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters.

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This preference of males to females is entirely agreeable to the law of succession among the Jews,<sup>1</sup> and also among the states of Greece, or at least among the Athenians;<sup>2</sup> but was totally unknown to the laws of Rome,<sup>3</sup> (such of them, I mean, as are at present extant,) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex: but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males,<sup>4</sup> yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance.<sup>5</sup> But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident pre-

<sup>1</sup> Except so far as it would give the preference in descents after 1834 to a male of the half blood in preference to a female of the whole blood. See *post*, p. 269.

<sup>2</sup> Hal. H. C. L. 235.

<sup>3</sup> Numb. c. 27.

<sup>4</sup> Petit. LL. *Attic.* l. 6, t. 6.

<sup>5</sup> Inst. 3, l. 6.

<sup>6</sup> Stat. Wall. 12 Edw. 1.

<sup>7</sup> LL. Canut. c. 68.

ference of the law to the female sex. "*Pater aut mater, defuncti, filio, non filia hereditatem relinquent. . . . . Qui defunctus non filios sed filias relinquerit, ad eas omnis hæreditas pertineat.*"<sup>a</sup> It is possible therefore that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest; especially as it subsists among the customs of gavelkind, and as, in [ 214 ] the charter or laws of king Henry the First, it is not (like many Norman innovations) given up, but rather enforced.<sup>b</sup> The true reason of preferring the males must be deduced from feudal principles; for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud,<sup>c</sup> inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations, our law, like that of the Saxon feudists before mentioned, thus steering a middle course, between the absolute rejection of females and the putting them on a footing with males.

III. The eldest male inherits, but the females altogether.

III. A third rule or canon of descent, is this; that where there are two or more males in equal degree, the eldest only shall inherit; but the females altogether; and this rule also remains unaltered.

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies: Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.<sup>d</sup>

History of this rule.

This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance;<sup>e</sup> in the same manner as with us, by the laws of king Henry the First,<sup>f</sup> the eldest son had the capital fee or principal

<sup>a</sup> tit. 7, ss 1 & 4.

<sup>b</sup> c. 70.

<sup>c</sup> 1 Feud. 8

<sup>d</sup> Litt. s. 5; Hale, H. C. L. 238.

<sup>e</sup> Selden *de succ. Ebr.* c. 5.

<sup>f</sup> c. 70.



feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary.<sup>x</sup> The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; [ 215 ] some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible,<sup>y</sup> or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments.<sup>z</sup> These reasons occasioned an almost total change in the method of feudal inheritances abroad: so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the Conqueror.

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil<sup>a</sup> wrote, in the reign of Henry the Second; and it is mentioned in the Mirror,<sup>b</sup> as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the Third's time we find by Bracton<sup>c</sup> that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: except in Kent, where they [ 216 ]

<sup>x</sup> Glanvil l. 7, c. 3.<sup>y</sup> 2 Feud. 55.<sup>z</sup> Hale, H. C. L. 221.<sup>a</sup> l. 7, c. 3.<sup>b</sup> c. 1, s. 3.<sup>c</sup> l. 2, c. 30, 31.

gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons;<sup>d</sup> and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

In what primogeniture takes place with females.

As to the females, they are still left as they were by the ancient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown;<sup>e</sup> wherein the necessity of a sole and determinate succession is as great in the one sex as in the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the King shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases.<sup>f</sup> In which disposition is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—" *progressum est, ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confermare.*"<sup>g</sup>

IV. Lineal descendants shall represent their ancestors.

[ 217 ]

IV. A fourth rule, or canon of descents, is this; that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living; and this rule likewise is unaltered.

<sup>d</sup> Somner. Gavelk. 7. See *ante*, 180.

<sup>f</sup> *Ibid.*

<sup>e</sup> Co. Litt. 165.

<sup>g</sup> 1 Feud. 1.

Thus the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*.<sup>b</sup> And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles the father of the two sisters dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary, so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one a-piece.

This taking by representation is called succession in *stirpes* according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed;<sup>1</sup> but the Roman somewhat differed from it. In the descending line the right of representation continued *in infinitum*, and the inheritance still descended in *stirpes*: as if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting, (as if the deceased left one brother, and two nephews, the sons of another brother,) the succession was still guided by the *roots*: but, if both the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike; [ 218 ] they being themselves now the next in degree to the ancestor in their own right, and not by right of representation.\* So, if the next heirs of *Titius* be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into

Which is called succession in *stirpes*.

Examples of this rule.

<sup>b</sup> Hale, H. C. L. 236, 237.

<sup>1</sup> Selden, *de succ. Ebr.* c. 1.

<sup>\*</sup> Nov. 110, c. 3; Inst. 3, 1, 6.

six parts, and one given to each of the nieces. Whereas the law of England in this case would divide it only into three parts, and distribute it *per stirpes*: thus; one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

Illustration  
of the rule.

This mode of representation is a necessary consequence of the double preference given by our law, first, to the male issue, and next to the firstborn among the males, to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the firstborn, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man hath two sons, A. and B., and A.

[ 219 ] dies leaving two sons, and then the grandfather dies: now the eldest son of A. shall succeed to the whole of his grandfather's estate: and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But if a man hath only three daughters, C., D., and E.; and C. dies leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister: here when the grandfather dies, the eldest son of C. shall

succeed to one third, in exclusion of the younger; the two daughters of D. to another third in partnership: and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards in *infinitum*.

Yet this right does not appear to have been thoroughly established in the time of Henry the Second, when Glanvil wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength to back his pretensions and crush the right of his nephew. And even recently, in the lower Saxony, proximity of blood took place of representative primogeniture; that is, the younger surviving brother was admitted to the inheritance before the son of an elder deceased: which occasioned the dispute between the two houses of Mecklenburg—Schwerin and Strelitz, in 1692.<sup>1</sup> Yet Glanvil, with us, even in the twelfth century, seems<sup>m</sup> to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, (or as the civil law would call it,) had not been foris-familiated in his lifetime. King John, [ 220 ] however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm:<sup>n</sup> but in the time of his son, King Henry the Third, we find the rule indisputably settled in the manner we have here laid it down,<sup>o</sup> and so it has continued ever since. And thus much for lineal descents.

V. A fifth rule is, that on failure of lineal descendants, <sup>v. On failure</sup> or issue, of the person last seised, and also on failure of <sup>of lineal de-</sup>

<sup>1</sup> Mod. Un. Hist. xlii. 334.

<sup>m</sup> L 7, c. 3.

<sup>n</sup> Hale, H. C. L. 217, 229.

<sup>o</sup> Bracton, l. 2, c. 30, s. 2.

endants and  
ancestors,  
the inheri-  
tance shall  
descend to  
collaterals.

his lineal ancestors, with the qualification before mentioned, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the four preceding rules.

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family.<sup>p</sup> The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.<sup>q</sup>

History of  
this rule.

This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks and Romans: none of whose laws looked any farther than the person himself who died seised of the estate: but assigned him an heir: without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy<sup>r</sup> agrees with our law in this respect; nor indeed is that agreement to be wondered at, since the law of descents in both is of feudal original: and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles.

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*Feudum novum* and  
*feudum antiquum*.

When fends first began to be hereditary, it was made a necessary qualification of the heir, who should succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring, no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule: "*frater fratri, sine legitimo hærede defuncto, in beneficio quod eorum patris fuit succedat: sin autem unus e fratribus a domino feudum acceperit, eo*

<sup>p</sup> Co. Litt. 12.

<sup>q</sup> See *ante*, p. 238.

<sup>r</sup> *Gr. Custom.* c. 25.

"*defuncto sine legitimo hærede, frater ejus in feudum non succedit.*"\* The true feudal reason for which rule was this; that what was given to a man for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled) so in the feudal donation, "*nomen hæredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant:*"† the will of the donor, or original lord (when feuds were turned from life estates into inheritances,) not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*; not hereditary, to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

However, in process of time, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even in *infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchaser. For since it is not [ 222 ] ascertained in such general grants, whether this feud shall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata*, to have been the first purchaser: and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut*

Effect of  
this rule.

\* 1 Feud. 1, s. 2.

† Craig. l. 1, t. 9, s. 36.

*novum*; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance.

Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and, *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father. This was [ 223 ] also the rule of the French law,<sup>a</sup> which is derived from the same feudal fountain.

Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christian Smith, or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order

<sup>a</sup> Domat. part 2, pr.



the heirs to John Stiles of this estate ; because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

This is the great and general principle, upon which the law of collateral inheritance depends ; that upon failure of issue and lineal ancestors, in the last proprietor, the estate shall descend to the blood of the purchaser ; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law, to have originally descended : according to the rule laid down in the year books,<sup>w</sup> Fitzherbert,<sup>x</sup> Brooke,<sup>y</sup> and Hale,<sup>z</sup> “ that he who would have been heir to the father of the deceased ” (and of course, to the mother, or any other real or supposed purchasing ancestor) “ shall also be heir to the son ; ” a maxim that will hold universally, except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds, and is now almost entirely abolished.

The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was, which *in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be in feuds [ 224 ] that are held *ut antiquis*.

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman.

VI. That the collateral heir must be the next collateral kinsman.

First, he must be his next collateral kinsman, either personally or *jure representationis* ; which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally

<sup>w</sup> M. 12 Edw. 4, 14.

<sup>y</sup> *Ibid.* 83.

<sup>x</sup> Abr. t. *Discent*, 2.

<sup>z</sup> H. C. L. 243.

considers only the person deceased, to whom the relation is claimed : it therefore counts the degress of kindred according to the number of persons through whom the claim must be derived from him ; and makes not only his great nephew but also his first cousin to be both related to him in the fourth degree ; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins ; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him : so that the great nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second ; the former being distant three degrees from the common ancestor, (the father of the *propositus*,) and therefore deriving only one fourth of his blood from the same fountain ; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor, (the grandfather of each,) and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents ; and having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. Indeed the designation of person, in seeking for the next of kin, will come to exactly the same end (though the degrees will be differently numbered) whichever method of computation we suppose the law of England to use ; since the right of representation, of the parent by the issue, is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased ; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established.

[ 225 ] The issue or descendants therefore of John Stiles's brother

are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great uncle in the third, as their respective ancestors, if living, would have been; and are severally called to the succession in right of such their representative proximity.

The right of representation being thus established, the present rule amounts to this: that on failure of issue and lineal ancestors,<sup>a</sup> of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, and lineal ancestors, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance among the ancient Germans, our progenitors: "*hæredes successoresque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patruī, avunculi.*"<sup>b</sup>

Now here it must be observed, that the lineal ancestors, [ 226 ] though (according to the former law) incapable themselves of succeeding to the estate, were yet the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours,<sup>c</sup> the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, &c., but in right of representation, as the offspring of the father, grandfather, &c., of the deceased.<sup>d</sup> But though the common ancestor be thus the root of the inheritance in descents on deaths before the 1st of January, 1834, yet it was not necessary to name him in making out the pedigree or descent. For the descent between two brothers was held to be an *immediate* descent; and therefore title might be made by one brother or his representatives to or through another, without mentioning their common

The descent between brothers was immediate,

<sup>a</sup> See *ante*, p. 250.

<sup>b</sup> Tacitus *de Mor. Germ.* 21.

<sup>c</sup> Numb. c. 27.

<sup>d</sup> Selden, *de Succ. Ebr.* c. 12.

father.<sup>d</sup> If Geoffrey Stiles had two sons, John and Francis, Francis might claim as heir to John, without naming their father Geoffrey : and so the son of Francis might claim as cousin and heir to Matthew the son of John, without naming the grandfather ; viz. as son of Francis, who was the brother of John, who was the father of Matthew.

but this is  
now altered.

But this rule is now altered with respect to descents on the deaths of persons who shall die after the 1st of January, 1834, it being enacted that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.\* Though the common ancestors, according to the common law, were not named in deducing the pedigree, yet the law still respected them as the fountains of inheritable blood : and therefore, in order to ascertain the collateral heir of John Stiles, it is both according to the former and the existing law, first necessary to recur to his ancestor in the first degree ; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards in *infinitum* ; till some couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these

How colla-  
teral heirs  
are traced

[ 227 ]

ancestors the heir of John Stiles must derive his descent ; and in such derivation the same rules must be observed, with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

But, in descents which took place on the death of any person who died before the 1st of January 1834, the heir need not be the nearest kinsman absolutely, but only *sub modo* ; that is, he must be the nearest kinsman of the *whole* blood ; for, if there be a much nearer kinsman of the *half* blood, a distant kinsman of the *whole* blood shall be admitted, and the other entirely excluded ; nay, in such descents, the estate shall escheat to the lord sooner than the half blood shall inherit.

<sup>d</sup> 1 Sid. 196 ; 1 Ventr. 423 ; 1 Lev.      \* 3 & 4 W. 4, c. 106, s. 5.  
60 ; 12 Mod. 619.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. Thus the blood of John Stiles, being composed of those of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him: the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they could never, according to the former law, inherit to each other. So also, if the father has two sons, A. and B., by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore could never, according to the former law, inherit to each other, but the estate would rather escheat to the lord. Nay, if even the father died, and his lands descended to his eldest son A., who entered thereon, and died seised without issue; still B. should not be heir to this estate, because he was only of the half blood to A., the person last seised: but it should descend to a sister (if any) of the whole blood to A.; for in such cases the maxim is, that the seisin or *possessio fratris facit sororem esse hæredem*. Yet, had A. died without entry, then B. might have inherited; not as heir to A. his half brother, but as heir to their common father, who was the last person actually seised.<sup>f</sup>

The rules as to the exclusion of the half-blood, to what titles it extends.

[ 228 ]

This total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the

The justice of the rule considered.

<sup>f</sup> Hale, H. C. L. 238. But see *ante*, since the recent statute, p. 247, as to the necessity of entry

reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible; then the law substituted what Sir Martin Wright calls a *reasonable*, in the stead of an *impossible*, proof; for it remits the proof of an actual descent from the first purchaser; and only requires, in lieu of it, that the claimant be next of the whole blood to the person last in possession; (or derived from the same couple of ancestors;) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser; for he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are, *vice versa*, his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock, the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser.

[ 229 ] To illustrate this by example. Let there be John Stiles and Francis, brothers, by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or

mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) was utterly incapable, until very recently, of being heir; for he could not prove his descent from the first purchaser, who is unknown, nor had he that fair probability which the law admits as presumptive evidence, since he was to the full as likely *not to be* descended from the line of the first purchaser, as *to be* descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And as this was the case in *feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it was also the case in *feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood were held very recently excluded, for want of the same probability. Nor could this (in Blackstone's opinion) be thought hard, that a brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all: for we have seen that in *feudis stricte novis*, neither brethren nor any other collaterals were admitted. As therefore in *feudis antiquis*, we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals, as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Perhaps by this time the exclusion of the half blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtle nicety: but, considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals: and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; yet, unless that common stock be in the first degree, (that is, unless they have the same father and mother,) there will be intermediate ancestors below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother,) one half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors; nor his *avunculus*, or mother's brother, from those in the paternal line. Here [ 231 ] then the supply of proof is deficient, and by no means amounts to a certainty: and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stiles



is sure to be descended from that unknown ancestor; his half brother has only an even chance; for half John's ancestors are not his. So in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great uncle of the whole blood, but they are seven to one against his great uncle of the half blood, for seven-eighths of John's ancestors have no connexion in blood with him. Therefore the much less probability of the half blood's descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

"But," says Blackstone, "while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried farther than the principle upon which it goes will warrant. Particularly, when a kinsman of the whole blood in a remoter degree, as the uncle or great uncle, is preferred to one of the half blood in a nearer degree, as the brother: for the half brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice better chance than the great uncle, or kinsman in the third degree. It is also more especially overstrained, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters, and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor.<sup>1</sup> This, it must be owned, carries a hardship with it, even

<sup>1</sup> A still harder case than this happened M. 10 Edw. 3. On the death of a man, who had three daughters by a first wife, and a fourth by another, his lands descended equally to all four as coparceners. Afterwards the two eldest died without issue; and it was held, that the third daughter alone should inherit their shares, as being their heir of the whole blood;

and that the youngest daughter should retain only her original fourth part of their common father's lands. (10 Ass. 27.) And yet it was clear law in M. 19 Edw. 2, that, where lands had descended to two sisters of the half blood, as coparceners, each might be heir of those lands to the other. (Mayn. Edw. 2, 628. Fitzh. Abr. tit. *Quare Impedit*, 177.)

[ 232 ] upon feudal principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors. When therefore there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother indeed been a purchaser, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

" Indeed it is this very instance, of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *à patre*, that Craig<sup>k</sup> has singled out, on which to ground his strictures on the English law of half blood. And, really, it should seem as if originally the custom of excluding the half blood in Normandy<sup>l</sup> extended only to exclude a *frater uterinus*, when the inheritance descended *à patre*, and *vice versa*: and possibly in England also: as even with us it remained a doubt in the time of Bracton,<sup>m</sup> and of Fleta,<sup>n</sup> whether the half blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly purchased lands. So also the

[ 233 ] rule of law as laid down by our Fortescue,<sup>o</sup> extends no farther than this: *frater fratri uterino non succedat in hæreditate paterna*. It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half

<sup>k</sup> L. 2, t. 15, s. 14.

<sup>n</sup> L. 6, c. 1, s. 14.

<sup>l</sup> *Gr. Coutum*, c. 25.

<sup>o</sup> *De Laud. LL. Angl.* 5.

<sup>m</sup> L. 2, c. 30, s. 3.

blood of the preceding sovereign,<sup>p</sup> so that it be the blood of the first monarch, purchaser, (or in the feudal language) conqueror of the reigning family. Thus it actually did descend from king Edward the Sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by act of parliament<sup>q</sup>) the princess Sophia of Hanover. Hence also it is, that the estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent: because, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit, where the estate notoriously descended from its own proper ancestor, and, in cases of new purchased lands or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long established rule should be shaken, it is not for me to determine."

But this rule excluding the half blood, which was in some cases considered a harsh one by Blackstone himself, is now altered so far as it relates to descents on deaths after the 1st of January, 1834, it being enacted by the 3 & 4 W. IV., c. 106, s. 9, that any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female; so that the brother of the half blood, on the part of the father, shall inherit next after

The rule excluding the half blood altered.

<sup>p</sup> Plowd. 245; Co. Litt. 15.

<sup>q</sup> 12 Will. 3, c. 2.

<sup>r</sup> Litt. s. 14, 15.

the sisters of the whole blood, on the part of the father and their issue; and the brother of the half blood, on the part of the mother, shall inherit next after the mother.\*

Rule VI.  
further ex-  
emplified.

The rule then, together with its illustration, amounts to this: before the recent alteration of the law as to the half blood, that, in order to keep the estate of John Stiles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor as those who are descended from both.

[ 234 ] But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards,<sup>1</sup> the descendants of all which respective couples are (representatively) related to him in the same degree. Thus in the second degree, the issue of George and Cecilia Stiles and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which therefore of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness*, of blood. For,

VII. In col-  
lateral inhe-  
ritances,  
the male  
stocks shall  
be preferred  
to the fe-  
male.

VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female; (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,)—unless where the lands have, in fact, descended from a female.

\* See this exemplified in the table of descents, *post*, p. 281.

<sup>1</sup> See p. 241.

Thus the relations on the father's side, are admitted in *infinitum*, before those on the mother's side are admitted at all;<sup>u</sup> and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden,<sup>v</sup> and Petit;<sup>x</sup> though among the Greeks in the time of Hesiod,<sup>y</sup> when a man died without wife or children, all his kindred (without any distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian<sup>z</sup> abolished all distinctions between them. It is also conformable to the customary law of Normandy,<sup>a</sup> which indeed in most respects agrees with our English law of inheritance. [ 235 ]

However, I am inclined to think, that this rule of our law does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchaser. For, when such first purchaser was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession, but also considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchaser to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father rather than from the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side

Origin of  
this rule.

<sup>u</sup> Litt. s. 4.

<sup>v</sup> De succ. Ebraeor, c. 12.

<sup>x</sup> LL. Attic. l. 1, t. 6.

<sup>y</sup> Georgor, 606.

<sup>z</sup> Nov. 118.

<sup>a</sup> Gr. Coustum. c. 25.

of the father, the father's father, and so upwards ; imagining with reason that this was the most probable way of continuing it in the line of the first purchaser. A conduct much more rational than the preference of the *agnati*, by the Roman laws : which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one : upon which account this preference was very wisely abolished by Justinian.

[ 236 ] That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will further appear, if we consider that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by the father's side as such, can ever be admitted to them : because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother, Cecilia Kempe : here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland, the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe, the father of Cecilia, is excluded. Whereas when the side from which they descended is forgotten, or never known, or as we have seen the rule now to be, it cannot be proved that they were inherited ;<sup>b</sup> here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance ; and, if it finds no heirs there, it then, and then only, resorts to the mother's side ; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors ; but, upon failure of issue there, they may possibly be found among those derived from the females.

Reasons for  
the agnatic  
succession.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the

<sup>b</sup> See *ante*, p. 238.

male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that, if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchaser: [ 237 ] but, as males have not been *perpetually admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser; which joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules, both as they formerly existed and as they have been altered, by a short sketch of the manner in which we must search for the heir of a person, as *John Stiles*, who dies seised of land which he acquired; and which he therefore held as a feud of indefinite antiquity; and we shall first trace this with respect to descents which have taken place on the deaths of persons who have died before the 1st of January, 1834; and here we beg to refer the reader to the Roman numerals in the table annexed, with the observation that wherever a table occurs to which there is no such number attached, but only the Arabian numbers, the inheritance according to the old rules would never come to the person mentioned in such table.<sup>c</sup>

How search must be made for an heir, according to the former and the present law.

In the first place succeeds the eldest son, *Matthew Stiles*, or his issue: (No. I.)—if his line be extinct, then *Gilbert Stiles* and the other sons, respectively in order of birth, or issue; (No. II.)—in default of these, all the daughters together, *Margaret* and *Charlotte Stiles*, or their issue, (No. III.)—on failure of the descendants of *John Stiles* himself, the issue of *Geoffrey* and *Lucy Stiles*, his parents, is called in: viz. first, *Francis Stiles*, the eldest brother of the whole blood, or his issue: (No. IV.)

Descent traced according to the former law.

<sup>c</sup> See the table of descents, facing p. 280.

—then Oliver Stiles, and the other whole brothers, respectively in order of birth, or their issue; (No. V.)—then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue; (No. VI.)—in defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (No. VII.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (No. VIII.)—then the issue of Richard and Ann Stiles, the parents of his paternal grandfather's father: (No. IX.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (No. X.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*; till both the immediate bloods of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (No. XI.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. XII.)—and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*.—In default of which, we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (No. XIII.)—and so on in the paternal grandmother's maternal line, or blood of Francis Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent.—Whereby the paternal blood of *John Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers. (Nos. XIV., XV., XVI.) Willis's, (No. XVII.) Thorpe's (No. XVIII., XIX.) and White's (No. XX.,) in the same regular successive order as in the paternal line.

Whether No.  
X. or No.  
XI. is to be  
preferred.

The student should however be informed, that the class No. X. would be postponed to No. XI., in consequence of the doctrine laid down, *arguendo*, by Justice Manwoode, in the case of Clere and Brooke;<sup>d</sup> from whence it is adopted by lord Bacon,<sup>e</sup> and Sir Matthew Hale:<sup>f</sup> because,

<sup>d</sup> Plowd. 450.

<sup>e</sup> Elem. c. 1.

<sup>f</sup> H. C. L. 240, 244.



it is said, that all the female ancestors on the part of the father are equally worthy of blood; and, in that case, proximity shall prevail. And yet, notwithstanding these respectable authorities, Blackstone has forcibly contended (in point of theory, for the case never yet occurred in practice) that preference should be given to No. X. before No. XI.; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke: but the law concerning it is delivered *obiter* only, and in the course of argument by Justice Manwoode: though afterwards said to be confirmed by the three other justices in separate, extrajudicial, conferences with the reporter. 2. Because the chief-justice, Sir James Dyer, in reporting the resolution of the court in what seems to be the same case,<sup>s</sup> takes no notice of this doctrine. 3. Because it appears from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of Justice Manwoode; since the blood of No. X. was derived to the purchaser through a greater number of males than the blood of No. XI., and was therefore in their opinion the more worthy of the two. 4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table: wherein No. XVI., which is analogous in the maternal line to No. X. in the paternal, is preferred to No. XVIII., which is analogous to No. XI., upon the authority of the eighth rule laid down by Hale himself: and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before<sup>b</sup> given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author;<sup>1</sup> and establishes a collateral doctrine, (*viz.* the preference of No. XI. to No. X.) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of No. XI. to No. XIV. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared,

<sup>s</sup> Dyer, 314.<sup>b</sup> Page 273—275.<sup>1</sup> Law of inheritances, 2d edit. p. 30, 38, 61, 62, 66.

by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because the reason that is given for this doctrine by lord Bacon, (*viz.* that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood) is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents. 7. Because this position seems to contradict the allowed doctrine of Sir Edward Coke;<sup>k</sup> who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfield's) fail. Now the blood of the Stiles's does<sup>j</sup> certainly not fail till both No. IX. and No. X. are extinct. Wherefore No. XI. (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV. 14,<sup>l</sup> (much relied on in that of Clere and Brooke,) it is laid down as a rule, that "*cestuy que doit inheriter al pere, doit inheriter al fils.*"<sup>m</sup> And so Sir Matthew Hale<sup>n</sup> says, "that though the law excludes  
[ 240 ] "the father from inheriting; yet it substitutes and directs "the descent, as it should have been, had the father inherited." Now it is settled, by the resolution of Clere and Brooke, that No. X. should be inherited before No. XI. to Geoffrey Stiles, the father, had he been the person last seised; and therefore No. X. ought also to be preferred in inheriting to *John Stiles*, the son.

All doubt removed by 3 and 4 W. IV. c. 106.

But all doubt as to this point has now been put an end to by the legislature, which has adopted Blackstone's view respecting it, and has enacted that in all descents on deaths after the 31st of December, 1833, where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced and their descendants, the mother of his more remote male paternal ancestor or her descendants, (that is to say, Jane Smith and her issue,) shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor or her descendants (as Frances Kempe and her issue;) and when there shall be a failure of male maternal ancestors of such person and their descendants, the

<sup>k</sup> Co. Litt. 12; Hawk. Abr. *in loc*

<sup>m</sup> See p. 261.

<sup>l</sup> Fitzh. Abr. tit. *Discent*, 2; Bro.

<sup>n</sup> Hist. C. L. 243.

Abr. tit. *Discent*, 3.

mother of his more remote male maternal ancestor and her descendants shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants.<sup>o</sup>

We shall now search for the heir of a person, who having acquired lands, otherwise than by inheritance,<sup>p</sup> has died entitled to them under the statute since the 31st of December, 1833. And here we must refer the reader, in looking at the annexed table, to the Arabian, and not to the Roman numerals, which will at once serve to show the true line of descent since the statute 3 & 4 W. IV. c. 106, and the difference between the rules as they formerly stood and as they have been altered.

Descent traced according to the new law.

In the first place, as under the old law, succeeds the eldest son, Matthew Stiles or his issue (1). If his line be extinct, then Gilbert Stiles and other sons respectively in order of birth or their issue (2). In default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue (3). On failure of the descendants of John Stiles himself, a great difference obtains: for the inheritance goes to his father, Geoffery Stiles (4), and then to his issue, Francis Stiles, the eldest brother of the whole blood of John Stiles or his issue (5); then to Oliver Stiles and the other brothers of John Stiles of the whole blood, respectively in order of birth, or their issue (6). Then to the sisters of John Stiles, of the whole blood all together, Bridget and Alice Stiles or their issue (7). And it is to be remembered that these descents of Francis, Oliver, Bridget and Alice, are to be traced through their father Geoffery, and not to be taken immediately from John Stiles.<sup>q</sup> In default of issue of Geoffery Stiles of the whole blood to John Stiles, recourse under the new law will be had to the issue of Geoffery of the half blood to John, that is, to Peter Stiles, his half brother or his issue (8), and to Margaret Stiles and Emma Stiles (9), his half sisters together, or their issue. In default of all issue of Geoffery Stiles, George Stiles (10), his father first, if alive, and then the issue of George and Cecilia Stiles, his parents (11), and

<sup>o</sup> 3 & 4 W. 4, c. 106, s. 8.

<sup>p</sup> See *ante*, p. 238.

<sup>q</sup> See *ante*, p. 263.

next the issue of George Stiles of the half blood (12), will take, respect being still had to their age, sex, and blood; then in the same way Walter, the father of the paternal grandfather (13), the issue of Walter and Christian Stiles (14), and the issue of the half blood of Walter (15); and so on in the paternal grandfather's paternal line (16, 17), *in infinitum*. In default of these, it is expressly enacted, as we have already seen,<sup>r</sup> that Anne Godfrey (18) would take; and so on in the maternal line of Walter Stiles *in infinitum*. In failure of this resort would be had to the maternal line of George Stiles, and Christian Smith (19) would take; then her issue of the half blood (20); then William Smith her father (21); then his issue (22), then Jane Smith (23), and so on in the paternal grandfather's maternal line *in infinitum*, till both the bloods of George Stiles, the paternal grandfather, are spent. Then we must resort to Cecilia Kempe, the paternal grandmother (24); then to her half blood (25); then to Luke Kempe, the father of the paternal grandmother (26); then to his issue of the whole and half blood (27 and 28); and so on in the paternal grandmother's paternal line *in infinitum*. In default of which we must call in Frances Holland (32); then her issue of the half blood (33); then Charles Holland (34); his issue (35); and then Mary Holland (36); and so on in the paternal grandmother's maternal line, or blood of Frances Holland *in infinitum*, till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent: whereby the paternal blood of John Stiles entirely failing, recourse must then, and not before, be had to the maternal relations; in the first place, to his mother (37) and her issue (38, 39), and then to the blood of the Bakers (40 to 41), Willises (49 to 53), Thorpes (54 to 61), and Whites (62 to 66), in the same regular successive order as has last been laid down in the paternal line.

[ 240 ] In case *John Stiles* was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it

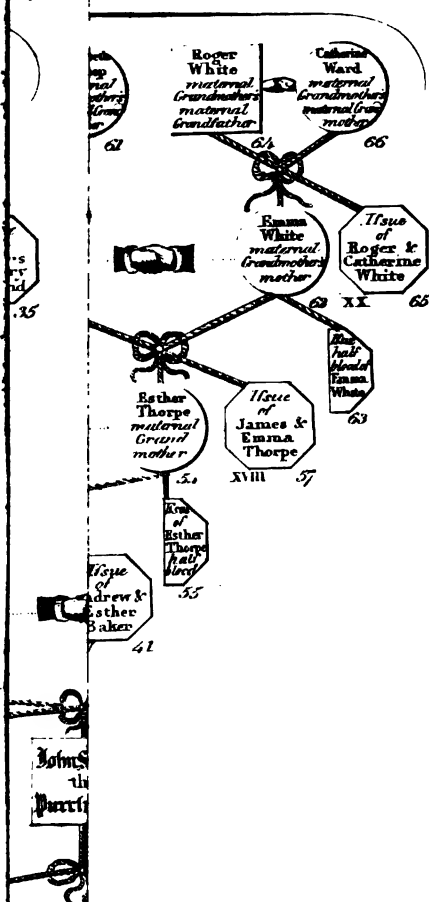
If John Stiles was not the purchaser, what blood can inherit.

<sup>r</sup> See p. 278.

D

1834.

A. W.



the py ancestor.

Chap.XV.-to face pa.280.



did not descend, can never inherit : as was formerly fully explained.\* And the like rule as is there exemplified, will hold upon descents from any other ancestors.

The student should also bear in mind, that, during this whole process, *John Stiles* is the person supposed to have been last actually seised of or entitled<sup>t</sup> to the estate. For, if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir ; since he, by his own seisin or title, now becomes himself an ancestor or *stipes*, and must be put in the place of *John Stiles*. The figures therefore denote the order in which the several classes will succeed to *John Stiles*, and not to each other ; and before we search for an heir in any of the higher figures, (No. VIII.) or (14), we must be first assured that all the lower classes from No. (1) to No. (VII.) or from (1) to (13) are extinct at *John Stiles's* decease.

In the table John Stiles is supposed to be the person last entitled.

It should further be observed, that the new act extends to all hereditaments, corporeal and incorporeal, whether freehold or copyhold, and whether descendible according to the common law or according to the custom of gavelkind, borough English, or other custom.<sup>u</sup>

What property the act extends to.

\* See p. 274.

<sup>t</sup> See *ante*, p. 247.

<sup>u</sup> 3 & 4 W. 4, c. 106, s. 1.

## CHAPTER THE SEVENTEENTH.

## [ 241 ] OF TITLE BY PURCHASE; AND FIRST, BY ESCHEAT.

Purchase.  
Legal definition of.

**PURCHASE**, *perquisitio*, taken in its largest and most extensive sense, may now be defined to be the possession of lands and tenements which a man hath by his own act or agreement,<sup>a</sup> or by the devise or gift of his ancestor,<sup>b</sup> and not by mere descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law;<sup>c</sup> which title we have seen<sup>d</sup> has been recently much narrowed. It is proper, however, to observe, that in the construction of the late inheritance act, (3 & 4 W. IV. c. 106,)\* the word *purchaser*, has a more limited meaning than formerly.

Examples of purchase.

Purchase, indeed, in its vulgar and confined acceptance, is applied only to such acquisitions of land as are obtained by way of bargain and sale, for money or some other valuable consideration. But this falls far short of the legal idea of purchase: for if I *give* land freely to another, he is in the eye of the law a purchaser;<sup>f</sup> and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him.<sup>g</sup> Nay, even if the ancestor devised his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir always

<sup>a</sup> Litt. s. 12.

<sup>b</sup> See *ante*, p. 238.

<sup>c</sup> Co. Litt. 18.

<sup>d</sup> See *ante*, p. 238.

<sup>e</sup> s. 1. stated *ante*, p. 238.

<sup>f</sup> Co. Litt. 18.    <sup>g</sup> See *post*, p. 235.



took by purchase.<sup>b</sup> But if a man seised in fee, before the [ 242 ] recent statute, devised his whole estate to his heir at law, so that the heir took neither a greater nor a less estate by the devise than he would have done without it, he was adjudged to take by descent,<sup>i</sup> even though it were charged with incumbrances;<sup>k</sup> this being for the benefit of creditors, and others, who had demands on the estate of the ancestor. But as we have seen<sup>l</sup> this rule is now altered with respect to devises by testators who shall die after the 31st day of December, 1833.

If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasers.<sup>m</sup> But, if an estate be made to A. for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, commonly called the rule in Shelley's case, from the name of a leading case in which it was recognized, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by purchase, but only by descent.<sup>n</sup> And if A. dies before entry, still his heir shall take by descent, and not by purchase: for, where the heir takes any thing that might have vested in the ancestor, he takes by way of descent.<sup>o</sup> The ancestor, during his life, beareth in himself all his heirs;<sup>p</sup> and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of purchase, but a word of limitation, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the

The rule in  
Shelley's  
case.

<sup>b</sup> Lord Raym. 728.

<sup>i</sup> Roll. Abr. 626.

<sup>k</sup> Salk. 241; Lord Raym. 728.

<sup>l</sup> See *ante*, p. 239.

<sup>m</sup> 1 Roll. Abr. 627.

<sup>n</sup> 1 Rep. 93, 104; 2 Lev. 60;  
Raym. 834.

<sup>o</sup> 1 Rep. 98.

<sup>p</sup> Co. Litt. 22.

times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory, arising from a descent to the heir.

Feudal signification of purchase.

[ 244 ]

What we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquæstus*, or *conquisitio*:<sup>p</sup> both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland,<sup>q</sup> as it was among the Norman jurists, who styled the first purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur*.<sup>r</sup> Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was in his own and his successor's charters, and by the historians of the times, entitled *conquæstus*, and himself *conquæstor* or *conquisitor*;<sup>s</sup> signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had.

Difference between estates by descent and by purchase.

The difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase, the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For when a man took an estate by purchase, he took it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side; but he took it *ut feudum antiquum*, as a feud of indefinite antiquity; whereby it became inheritable to his heirs general, first of the paternal, and then of the maternal line. And now, as we have already seen,<sup>t</sup> it is enacted by 3 & 4 W. IV. c. 106, s. 2, that the per-

<sup>p</sup> Crag. l. 1, t. 10, s. 18.

<sup>q</sup> Spelm. Gloss. 145.

<sup>r</sup> Dalrymple of Feuds, 210.

<sup>s</sup> See chap. 16, p. 238.

<sup>t</sup> Gr. Coustum. Gloss. c. 25, p. 40.

son last entitled to any lands shall be considered to have been the purchaser thereof, unless the contrary be proved; and if such proof is given, then the last person from whom the land shall be proved to have been inherited shall be considered to have been the purchaser. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dies; this deed, obligation or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him)<sup>u</sup> had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to)<sup>v</sup> that ancestor, sufficient to answer the charge;<sup>x</sup> whether he remains in possession, or hath alienated it before action brought;<sup>y</sup> which sufficient estate is in the law called *assets*; from the French word *assez*, enough.<sup>z</sup> Therefore [ 244 ] if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent.<sup>a</sup> By the 3 & 4 W. IV. c. 106, s. 4, it is to be observed that when any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance, executed after the 31st of Dec. 1833, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect contained in the will of any testator who shall die after the 31st of Dec. 1833, such land shall descend, and the descent thereof shall be traced, as if the ancestor named in such limitation had been the purchaser of such land. And in the construction of the above act, the word "purchaser" shall mean the person who last purchased the land otherwise than by descent, or by any *escheat*, partition or inclosure,

*Assets, definition of.*

*Where lands shall have been acquired under limitations to the heirs.*

<sup>u</sup> Stat. 29 Car. 2, c. 3, s. 12.

<sup>v</sup> *Ibid.* s. 12.

<sup>x</sup> 1 P. Wms. 777.

<sup>y</sup> Stat. 3 & 4 W. & M. c. 14.

<sup>z</sup> Finch. Law. 119.

<sup>a</sup> Finch. Rep. 86.

by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent (s. 1).

What purchase includes.

Such is the legal signification of the word *perquisitio*, or purchase; and in its full sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

Escheat.

Definition of.

1. Escheat, we may remember,<sup>b</sup> was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman,<sup>c</sup> in which language it signifies chance or accident: and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.<sup>d</sup>

Escheat is a title partly by descent and partly by purchase.

Escheat therefore being a title frequently vested in the lord by inheritance, as being the fruit of a signiory to which he was entitled by descent, (for which reason the lands escheating shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other<sup>e</sup>) it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* by descent, (being vested in him by act of law, and not by his own act or agreement) than under the present, by purchase. But it must be remembered that, [ 245 ] in order to complete this his title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or formerly by suing out a *writ of escheat*:<sup>f</sup> on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred.<sup>g</sup> It is therefore a title acquired by his own act, as well as by act of law. Indeed this might also be said of descents themselves, in which an entry or other seisin was required, in order to make a complete title; and therefore this dis-

<sup>b</sup> *Ante*, p. 74.

<sup>c</sup> *Eschet* or *échet*, formed from the verb *eschoir* or *échoir*, to happen.

<sup>d</sup> 1 *Feud.* 86; Co. Litt. 13.

<sup>e</sup> Co. Litt. 13.

<sup>f</sup> Bro. Abr. tit. *Escheat*, 26.

<sup>g</sup> Bro. Abr. tit. *Acceptance*, 25; Co. Litt. 268.

tribution of titles, by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant,<sup>b</sup> and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caducary succession.

The law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail, the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*; the one sort, if the tenant dies without heirs; the other if his blood be attainted.<sup>1</sup> But both these species may well be comprehended under the first denomination only; for he that is attainted, suffers an extinction of his blood, as well as he that dies without relations. The inheritable [ 246 ] quality is expunged in one instance, and expires in the other: or, as the doctrine of escheats is very fully expressed in Fleta,<sup>k</sup> "*dominus capitalis feodi loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*"

Escheats therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

Foundation  
of the law of  
escheats.

Escheats  
sometimes  
divided into  
those *propter  
defectum  
sanguinis*,  
and *propter  
delictum  
tenentis*.

How heredi-  
tary blood  
may be  
deficient.

<sup>b</sup> 1 Inst. 215.

<sup>1</sup> Co. Litt. 13, 92.

<sup>k</sup> L. 6, c. 1.

1, 2, 3. Where  
tenant dies  
without  
relations.

1, 2, 3. The first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended: thirdly, when he dies without any relations of the whole blood. But this last case, as we have seen,<sup>k</sup> is now much qualified. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end; and therefore in all of them, to the extent mentioned in the last chapter, the law directs that the land shall escheat to the lord of the fee: for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.

By the com-  
mon law  
trust estates  
escheated.

It was a rule of the common law, that when a person died without heirs, or was convicted of treason or felony, the lands which he held as the legal owner in trust for others, escheated or became forfeited to the lord, who held them discharged of the trust.<sup>l</sup> This rule was so obviously unjust, that it was altered by several recent statutes, in all cases where the superior lord was the crown; and the king was thereby enabled, by sign manual or under the seal of the Duchy of Lancaster, to grant lands devolving upon the crown by escheat or forfeiture, or from having been purchased by or in trust for an alien, for the purpose of executing any trusts to which they had been directed to be applied, or of restoring the same to the family of the persons whose estates they had been, or to carry into effect any intended disposition of such persons, or to reward persons making discoveries of such forfeiture, &c.; or to direct the lands to be sold, and the rents, or the produce of the sale, to be applied to these purposes, or to pay any debt or debts of the persons whose estates they had been.<sup>m</sup>

<sup>k</sup> See *ante*, p. 271.

<sup>m</sup> 39 & 40 G. 3, c. 88; 47 G. 3, s.

<sup>l</sup> Harg. Co. Litt. 13, n. (7); *Pimble's* 2, c. 24; 59 G. 3, c. 94.  
*case*, Moore, 196.

And by statute 6 G. IV., c. 17, the provisions of these statutes were extended to leaseholds. Personal chattels were, however, still within the operation of the rule of common law. But by the statute 4 & 5 W. IV., c. 23,<sup>Entire alteration by 4 & 5 W. IV. c. 23.</sup> this rule of the common law is entirely altered; it being enacted (s. 2), that where any person seised of any land upon any trust, or by way of mortgage, dies without an heir, the Court of Chancery may appoint a person to convey such land, in like<sup>a</sup> manner as if such trustee or mortgagee had left an heir, and it was not known who was such heir. It is further enacted (s. 3), that no land, chattels, or stock, vested in any person on trust, or by way of mortgage, or any profits thereof, shall escheat or be forfeited by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place. By s. 1, the estates and matters included in the act are specified; and by s. 4, it is mentioned to whom, and to what cases, its provisions shall extend. But the escheat or forfeiture of any lands, chattels, or stock, vested beneficially in any trustee or mortgagee, is not to be prevented by the act. (sec. 5.) The sixth section has a retrospective effect, and enacts, that where any person possessing lands, chattels, or stock, as a trustee thereof, shall have died without heirs, or have been convicted before the passing of the act, the lands, chattels, or stock, are to be subject to the control of the Court of Chancery, for the use of the party beneficially interested therein, and are to be considered within the provisions of the 11 G. IV., and 1 W. IV., c. 60, as if such person so dead without heirs, or so convicted, were out of the jurisdiction of, or not amenable to, the process of the court, without having been so convicted. But this section is not to relate to any lands, chattels, or stock, vested by virtue of any grant made subsequently to the time when such escheat or forfeiture first occurred, or to any lands, chattels, or stock, which more than twenty years prior to

<sup>a</sup> This is regulated by stat. 11 Geo. 4, and 1 Wm. 4, c. 60.

the act, shall have been actually vested in possession by the parties thereto entitled.<sup>o</sup>

4. A monster. 4. A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, [ 247 ] yet if it hath human shape, it may be heir.<sup>p</sup> This is a very ancient rule in the law of England;<sup>q</sup> and its reason is too obvious and too shocking to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions;<sup>r</sup> yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby;<sup>s</sup> (as the *jus trium liberorum*, and the like;) esteeming them the misfortune, rather than the fault of that parent. But our law will not admit a birth of this kind to be such an issue as shall entitle the husband to be tenant by the curtesy;<sup>t</sup> because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

5. Bastards. 5. Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur*.<sup>u</sup> Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord.<sup>v</sup> The civil law differs from ours in

<sup>o</sup> See also 1 & 2 Vict. c. 69.

<sup>p</sup> Co. Litt. 7, 8.

<sup>q</sup> *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosorum vel prodigiorum enixa sit, inter liberos non computantur. Partus tamen, cui natura aliquantum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari:*

*et, si membra sint inutilia aut tortuosa, non tamen est partus monstrosus.* Bract. l. 1, c. 6, and l. 5, tr. 5, c. 30.

<sup>r</sup> FF. 1, 5, 14.

<sup>s</sup> FF. 50, 16, 135; Paul. 4, sent. 9, s. 63.

<sup>t</sup> Co. Litt. 29.

<sup>u</sup> *Ibid.* 8.

<sup>v</sup> Finch. Law. 117.



this point, and allows a bastard to succeed to an inheritance, if after its birth the mother were married to the father;\* and the Scotch law conforms to the civil law in this respect, but such bastard, though thus legitimized in Scotland, cannot inherit lands in England.†

There is indeed one instance, however, in which our law has shown a bastard some little regard: and that is usually termed the case of a *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law, is called a *mulier*, or as Glanvil<sup>a</sup> expresses it in his Latin, *filius mulieratus*: the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigné*, and the younger son is legitimate, or *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisné*, and all other heirs, (though minors, feme coverts, and under any incapacity whatsoever) are totally barred of their right.<sup>a</sup> And this,

[ 248 ]

Case of bastard eigné and mulier puisné.

1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard's* life, and evicting him.
2. Because the law will not suffer a man to be bastardized after his death, who entered as heir, and died seised, and so passed for legitimate in his lifetime.
3. Because the canon law (following the civil) did allow such *bastard eigné* to be legitimate, on the subsequent marriage of his mother; and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all.<sup>b</sup>

\* Nov. 89, c. 8.

467, N. S.

† *Doe d. Birtwhistle v. Vardill*, 5 B. & C. 438; 6 Bli. 479, N. S.; 9 Bli. 32, N. S.; 1 Scott N. S. 828, S. C.; and see *Munro v. Saunders*, 6 Bli.

<sup>a</sup> L. 7, c. 1.

<sup>a</sup> Litt. s. 399; Co. Litt. 244.

<sup>b</sup> Litt. s. 400.

[ 249 ] As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee,<sup>d</sup> as well under the recent statute,<sup>e</sup> as under the former law.

Bastard has  
no heirs but  
those of his  
own body.

6. Aliens.<sup>f</sup> 6. Aliens,<sup>f</sup> unless they have been naturalised by act of Parliament, or made denizens by the King's letters patent, are incapable of taking by descent, or inheriting;<sup>g</sup> for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his lands shall escheat to the lord.

But all children or grandchildren, born out of the King's allegiance, are capable of inheriting lands, whose father or grandfathers were, at the birth of such children or grandchildren, natural-born subjects. If, however, the parents are not in actual obedience to the crown, their children are aliens. Thus since the recognition of the independence of the United States of America in 1785, the children of persons continuing to reside there after that time, and adhering to that Government, are incapable of being heirs to lands in England.<sup>h</sup>

Have no  
heirs.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase,<sup>i</sup>

<sup>d</sup> Bract. l. 2, s. 7; Co. Litt. 244.

<sup>e</sup> *Doe d. Blackburn v. Blackburn*, 1 Moo. & Rob. 547; 3 & 4 W. 4, c. 106.

<sup>f</sup> See Rights of Persons, c. 10.

<sup>g</sup> Co. Litt. 8.

<sup>h</sup> 25 Edw. 3, st. 2; 7 Anne, c. 5;

4 Geo. 2, c. 21; 13 Geo. 3, c. 21; 27 Geo. 3, c. 97, s. 24; *Doe d. Thomas v. Acklam*, 2 B. & C. 778; *Doe d. Auchmuty v. Mulcaster*, 5 B. & C. 771; *Sutton v. Sutton*, 1 Russ. & M. 663.

<sup>i</sup> Co. Litt. 2.

except by the King's license,<sup>k</sup> they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit: but so it is expressly holden,<sup>l</sup> because they have not in them any inheritable blood.

And farther, if an alien be made a denizen by the King's letters patent, and then purchases lands, (which the law allows such a one to do,) his son, born before the denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalised by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not.<sup>m</sup> [ 250 ]

Sir Edward Coke<sup>n</sup> also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law; not only from the rule before cited,<sup>o</sup> that *cestuy, que doit inheriter al pere, doit inheriter al fits*; but also because we have seen that the only feudal foundation, upon which newly-purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors: but in this case as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the lands should be inherited,

Where an alien is made a denizen who inherits.

Where alien has natural born sons, whether they can inherit to each other.

<sup>k</sup> Harg. Co. Litt. 2 b, n. 2.

<sup>n</sup> 1 Inst. 8.

<sup>l</sup> Co. Litt. 2; 1 Lev. 59.

<sup>o</sup> See pp. 261, 274.

<sup>m</sup> *Ibid.* 129.

*ut feudum stricte novum*: that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruled:<sup>o</sup> and it is now held for law, that the sons of an alien born here may inherit to each other; the descent from one brother to another being an *immediate* descent by the former law.<sup>p</sup> And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors, is but fictitious, the law may as well suppose the requisite ancestor, as suppose the requisite descent. But as the descent is now,<sup>q</sup> under the recent statute, to be traced through the parent, perhaps Sir Edward Coke's doctrine would be held to be the right one, as applicable to descents regulated by that statute.

[ 251 ] It is also enacted by the statute 11 & 12 W. III., c. 6, that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral: although their father or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis the elder brother of John Stiles, be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue his lands will descend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the statute of King William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it was provided by the stat. 25 G. II. c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised:—with an exception however to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with

Statutes relating to the children of aliens inheriting.

<sup>o</sup> 1 Vent. 473; 1 Lev. 59; 1 Sid.

<sup>p</sup> See page 268.

193.

<sup>q</sup> See *ante*, p. 264.

an after-born sister or sisters, according to the usual rule<sup>r</sup> of descents by the common law.

7. By attainder also for treason or other felony, the blood of the person attainted was so corrupted as to be rendered no longer inheritable; but this has been much limited by several recent statutes.

"Great care," says Blackstone, "must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands and of whatever else the offender possessed, was the doctrine of the old Saxon law,<sup>s</sup> as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any seigniorship or lordship paramount:<sup>t</sup> but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture." [ 252 ]

Distinction between escheat and forfeiture in this respect.

"The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised<sup>u</sup>) is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, and the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and

Doctrine of escheat on attainder.

<sup>r</sup> See pp. 246, 252.

<sup>t</sup> 2 Inst. 64; Salk. 85.

<sup>s</sup> *LL. Aelfred*, c. 4, *LL. Canut.* st. 5, c. 54.

<sup>u</sup> 3 Inst. 15; Stat. 25 Edw. 3, st. 5, c. 2, s. 12.

extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, for ever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat,<sup>v</sup> as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seems to be the old Saxon tenure,) that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason.<sup>x</sup>

[ 253 ]

Wife of felon  
when entitled  
to dower.

“As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12, enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI. c. 11, that the wife of one attaint of high treason, and petit treason,<sup>y</sup> shall not be endowed at all.

Effect of es-  
cheat as to  
rendering  
the person  
incapable of  
inheriting.

“Hitherto we have only spoken of estates vested in the offender, at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life: but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit.<sup>z</sup> In this case the escheat operates, and not the forfeiture; but

<sup>v</sup> 2 Inst. 36.

<sup>x</sup> Somner, 53; Wright. Ten. 118.

<sup>y</sup> Co. Litt. 37 a; Staundf. 195 b.

<sup>z</sup> Co. Litt. 13.

in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood: here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives.\*

"There was yet a farther consequence of the corruption and extinction of hereditary blood, which was this: that the person attainted should not only be incapable himself of inheriting, or transmitting his own property by heirship, but should also obstruct the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor. The channel, which conveyed the hereditary blood from his ancestors to him, was not only exhausted for the present, but totally dammed up and rendered impervious for the future. This was a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony.<sup>b</sup> But, by the law of England, a man's blood was so universally corrupted by attainder, that his sons could neither inherit to him nor to any other ancestor,<sup>c</sup> at least on the part of their attainted father.

The person attainted was incapable of transmitting his property to posterity.

[ 254 ]

"This corruption of blood," continues Blackstone, "cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is

\* 3 Inst. 47.

<sup>c</sup> Co. Litt. 391.

<sup>b</sup> Van Leeuwen in 2 Feud. 31.

made a new man, and may convey new inheritable blood to his after-born children.<sup>d</sup>

[ 255 ] “Herein there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have seen, that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir: and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood.<sup>e</sup> So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord.<sup>f</sup> Sir Edward Coke in this case allows,<sup>g</sup> that if the ancestor be attainted, his sons born before the attainder may be heirs to each other; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father: but he makes a doubt (upon the principles before-mentioned, which are now overruled<sup>h</sup>) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

“Upon the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor [before the recent statute]<sup>i</sup> to transmit any inheritance to his issue, either immediately from him-

<sup>d</sup> Co. Litt. 392.

<sup>e</sup> *Ibid.* 8.

<sup>f</sup> Dyer, 48.

<sup>g</sup> Co. Litt. 8.

<sup>h</sup> 1 Hal. P. C. 357.

<sup>i</sup> 3 & 4 W. 4, c. 106, s. 10.



self, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feudal property, is blotted out, corrupted, and extinguished for ever; the consequence of which is, that estates thus impeded in their descent, result back and escheat to the lord.

“ This corruption of blood, thus arising from feudal [ 256 ] principles, but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive parts of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty, (which, however severe, is sufficiently justified upon reasons of public policy,) but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies created by parliament since the reign of Henry the Eighth, it is declared that they shall not extend to any corruption of blood: and by the statute 7 Ann, c. 21, (the operation of which is postponed by the statute 17 Geo. II. c. 39,) it is enacted, that, after the death of the late pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself: which provisions have indeed carried the remedy farther than was required by the hardship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor.”

And now corruption of blood is almost entirely abolished, for by the statute 54 G. III., c. 145, corruption of blood

Corruption  
of blood  
abolished.

was abolished in all cases except the crimes of treason or murder; and by the 3 & 4 W. IV., c. 106, s. 10, it is enacted, that when any person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land, who would have been capable of inheriting the same by tracing his descent through such relation if he had not been

Descents to  
be made  
through  
attainted  
persons.

attainted, unless such lands shall have escheated in consequence of such attainder before the 1st of Jannary, 1834.<sup>1</sup>

Lands vested  
in corpora-  
tion, not  
liable to es-  
cheat.

Before I conclude this head, of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told,<sup>m</sup> doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is indeed founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself; till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1, to which this very singular instance still in some degree remains an exception.

[ 257 ]

Papists.

There was one more incapacity of taking by descent, which, not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It was enacted by the statute 11 & 12 Will. III. c. 4, that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation within six months after he had attained the age of eighteen years, should be incapable of inheriting, or taking by descent, as well as purchase, any real estates whatsoever; and his next of kin being a protestant, should hold them to his

<sup>1</sup> As to escheat of trust or mortgage estates, see 4 & 5 W. 4, c. 23, stated *ante*, p. 289, and Public Wrongs, ch. 29. When an escheat took place under the former law, it was usual in practice to restore the lands to the family of the former owner, and the

crown was empowered to do this by several express statutes, 1 Ann. st. 1, c. 7, 48 Geo. 3, c. 73.

<sup>m</sup> Co. Litt. 13; but see Harg. note, on the point, *contra*. See also 1 Fonb. Eq. 309, who agrees with Coke and Blackstone.

own use till such time as he complied with the terms imposed by the act. This incapacity was merely personal; it effects himself only, and did not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our own<sup>a</sup> and the feudal law; *eo quod desiit esse miles seculi qui factus est miles Christi: nec beneficium pertinet ad eum qui non debet gerere officium.*<sup>o</sup> But yet he was accounted only *civiliter mortuus*; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate. This act, however, was repealed, by statute 18<sup>p</sup> Geo. III. c. 60.

These are the several deficiencies of hereditary blood, recognised by the law of England, which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

<sup>a</sup> Co. Litt. 132.

<sup>o</sup> 2 Feud. 21.

<sup>p</sup> See Public Wrongs, ch. 4.

## CHAPTER THE EIGHTEENTH.

[ 258 ]

## OF TITLE BY OCCUPANCY.

Occupancy,  
definition of.

OCCUPANCY is the taking possession of those things, which before belonged to nobody. This, as we have seen,<sup>a</sup> is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognised by the laws of Rome,<sup>b</sup> *quod nullius est, id ratione naturali occupanti conceditur*.

In what it  
existed.

This right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak,) hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *pur auter vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie*, or him by whose life it was holden: in this case he that could first enter on the land might lawfully retain the possession so long as *cestui que vie* lived, by right of occupancy.<sup>c</sup>

This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did

<sup>a</sup> See pp. 3 & 7.<sup>b</sup> *Ff.* 41, 1, 3.<sup>c</sup> *Co. Litt.* 41.

not revert to the grantor, though it formerly<sup>d</sup> was supposed so to do; for he had parted with all his interest, so long as *cestui que vie* lived: it did not escheat to the lord of the fee; for all escheats must be of the absolute entire fee, and not of any particular estate carved out of [ 259 ] it; much less of so minute a remnant as this: it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in the grant; nor could it vest in his executors, for no executors could succeed to a freehold. Belonging, therefore, to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seised, and appropriated by the first person that could enter upon it, during the life of *cestui que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi*.<sup>e</sup> And, even in the case of a subject, had the estate *pur auter vie* been granted to a man and his heirs during the life of *cestui que vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant*, as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety;<sup>f</sup> and that such estate is rather a descendible freehold. But the title of common occupancy was reduced almost to nothing by two statutes: the one 29 Car. II. c. 3, which enacted, (according to the ancient rule of law,<sup>g</sup>) that where there was no special occupant in whom the estate might vest, the tenant *pur auter vie* might devise it by will, or it

<sup>d</sup> Bract. l. 2, c. 9, l. 4, tr. 3, c. 9, s. 4. Flet. l. 3, c. 12, s. 6, l. 5, c. 5, s. 15.

<sup>e</sup> Co. Litt. 41.

<sup>f</sup> Vaugh. 201. When the limitation is "to the executors, administrators,

and assigns," see *Westfaling v. Westfaling*, 3 Alk. 460. *Ripley v. Waterworth*, 7 Ves. 451. 2 Sand. Us. 307, Ed. 4. *Fitzroy v. Howard*, 3 Russ. 230.

<sup>g</sup> Bract. *Ibid.* Flet. *Ibid.*

should go to the executors or administrators, and be assets in their hands for payment of debts: the other, that of 14 Geo. II. c. 20, which enacted that the surplus of such estate *pur autre vie*, after payment of debts, should be applied and distributed in the same manner as the personal estate of the testator.<sup>b</sup>

Now nearly  
abolished.

[ 260 ] By these statutes the title of *common* occupancy is utterly extinct and abolished: though that of *special* occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance; but as an occupant especially marked out and appointed by the original grant. But, as before these statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like,<sup>i</sup> (because, with respect to them, there could be no actual entry made, or corporeal seisin had; and therefore on the death of the grantee *pur autre vie* a grant of such hereditaments was entirely determined,) so in the opinion of Blackstone, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed, in his opinion, so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant. When there was a residue left, the statutes give it to the executors and administrators, instead of the first occupant; but they would not *create* a residue, on purpose to give it to either.<sup>k</sup> They only meant to provide an appointed instead of a casual, a

<sup>b</sup> And it has very recently been enacted that where any person shall die seised of any real estate, whether freehold or copyhold, the same shall be assets for all his just debts, whether specialty or simple contract. 8 & 4 W. 4, c. 104.

<sup>i</sup> Co. Litt. 41; Vaugh. 201.

<sup>k</sup> But see now the statute 5 Geo. 3, c. 17, which makes leases for one, two, or three lives by *ecclesiastical* persons or any *eleemosynary* corporation of tithes or other incorporeal hereditaments, as good and effectual to all intents and purposes as leases of corporeal possessions.

certain instead of an uncertain, owner of lands which before were nobody's; and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform: this being the only instance wherein a title to a real estate could ever be acquired by occupancy. It has been held, however, contrary to the opinion of Blackstone,<sup>1</sup> that these statutes apply to rents, and, as it would seem, to all other incorporeal hereditaments, but not to copyholds.<sup>m</sup>

But by the recent act for amending the law relating to wills, 1 Vict. c. 26, (s. 1,) these statutes, except so far as relates to wills executed before Jan. 1, 1838, are repealed, but re-enacted, it being enacted (s. 3) that an estate *pur auter vie* of whatever tenure, and whether it be a corporeal or incorporeal hereditament, may in all cases be devised by will; and (s. 6) that if no disposition by will shall be made of any estate *pur auter vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur auter vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

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This is therefore the only instance; for I think there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a

Difference  
between  
actual and  
potential  
ownership.

<sup>1</sup> *Rawlinson v. Des. of Montague*, 3 P. Wms. 264, n.      <sup>m</sup> *Zouch v. Force*, 7 East, 186.

retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

Case of the rising of an island, or dereliction of land by the water.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us,<sup>a</sup> that if an island arise in the *middle* of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law.<sup>o</sup> Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed,<sup>p</sup> there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the *sea*, though the civil law gives it to the first occupant,<sup>q</sup> yet ours gives it to the king.<sup>r</sup> And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*: or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining.<sup>s</sup> For *de minimis non curat lex*: and besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this

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<sup>a</sup> L. 2, c. 2.

<sup>o</sup> Inst. 2, 1, 22.

<sup>p</sup> Salk. 637. See page 41.

<sup>q</sup> Inst. 2, 1, 18.

<sup>r</sup> Bract. 1. 2, c. 2; Callis of Sewers, 22.

<sup>s</sup> 2 Roll. Abr. 170; Dyer, 326; *Rex v. Harborough*, 3 B. & C. 106; Aff. Dom. Proc. 5 Bing. 170.



possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry.<sup>†</sup> So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner, if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss.<sup>‡</sup> It is also the law that if the sea by gradual and imperceptible progress encroach upon the land of the subject, the land thus covered with water belongs to the crown.<sup>§</sup> And this law of alluvions and derelictions with regard to *rivers*, is nearly the same in the imperial law;<sup>¶</sup> from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was elsewhere remarked,<sup>‡</sup> that whatever hath no other owner, is vested by law in the king.

<sup>†</sup> *Callis*, 24, 28.

<sup>‡</sup> *Ibid.* 28.

<sup>§</sup> *In re Hull and Selby Railway*, 5 Mee. & W. 327.

<sup>¶</sup> *Inst.* 2, 1, 20, 21, 22, 23, 24. See further *Blundell v. Cotterell*, 5 B. & A.

268; *Rex v. Lord Harborough*, 3 B. & C. 91; *Scrutton v. Brown*, 5 B. & C. 505.

<sup>‡</sup> *Rights of Persons* [298]. As to rights in water, &c., see *ante*, p. 36, 37.

## CHAPTER THE NINETEENTH.

[ 263 ]

## OF TITLE BY PRESCRIPTION.

Title by prescription.

A THIRD method of acquiring real property by purchase is that by *prescription*; as when a man can shew no other title to what he claims than that he, and those under whom he claims, used to enjoy it for a considerable period.

Until very recently all rights or benefits claimed by prescription must strictly have been proved to have commenced from time immemorial;<sup>a</sup> and although this rule was controlled by the courts presuming that after the right had been enjoyed for a considerable time, and nothing appeared to the contrary, it was rightly acquired, yet much injustice was frequently worked by shewing the commencement of the right within the strict time of prescription. To remedy this inconvenience, an act, relating to all the usual prescriptive rights, has been passed (2 & 3 W. IV. c. 71,) some of the provisions of which we have already had occasion to state.<sup>b</sup> This statute has considerably shortened the time of prescription in claims to rights of common and other profits *a prendre*, which are not to be defeated after thirty years' enjoyment by shewing the commencement thereof: and after sixty years' enjoyment the right is to be absolute, unless had by consent or agreement (s. 1). In claims of rights of way, rights of water, or other easements, the periods are to be twenty years, and forty years (s. 2); and the use of light, enjoyed for twenty years, is indefeasible, unless shewn to have been by consent (s. 3). In claims not provided for by the act, the old law of prescription, I presume, obtains.

In treating of prescription we shall first distinguish between *custom*,<sup>c</sup> strictly taken, and *prescription*; and then shew what sort of things may be prescribed for.

<sup>a</sup> See p. 32.<sup>b</sup> See *ante*, ch. 3.<sup>c</sup> See further as to customs, Rights of Persons, [67.]

And, first, the distinction between custom and prescription is this; that custom is properly a *local* usage, and not annexed to any *person*; such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage: as, that Sempronius, and his ancestors, or those whose estate he hath, hath used for a considerable time to have such an advantage or privilege.<sup>d</sup> As for example: if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times for their recreation; (which is held<sup>e</sup> to be a lawful usage;) this is strictly a custom, for it applied to the *place* in general, and not to any particular *persons*: but if the tenant, who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used, time out of mind, to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescriptions must be either in a man and his ancestors, or in a man and those whose estate he hath:<sup>f</sup> which last is called prescribing in a *que estate*. And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended<sup>g</sup> for an indefinite series of years. But by the statute of limitations, 32 Hen. VIII. c. 2, it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made.<sup>h</sup> And the time of prescription, as we have just seen, has been, in certain cases, much shortened by the 2 & 3 W. IV., c. 71; and by a still more recent act, (3 & 4 W. IV., c. 27,) to which we have already adverted, actions and suits relating to real property must be brought within twenty years after the right has accrued, except in cases

Distinction between custom and prescription.

Limitation of rights by prescription.

<sup>d</sup> Co. Litt. 113.

<sup>e</sup> 1 Lev. 176.

<sup>f</sup> 4 Rep. 32.

<sup>g</sup> Co. Litt. 113.

<sup>h</sup> This title of prescription, was

well known in the Roman law by the name of *usucapio*; (Ff. 41, 8, 8,) so called because a man that gains a title by prescription may be said *usu rem capere*.

of persons labouring under disability. By the 2 & 3 W. IV., c. 100, the time for making claims to tithes is also considerably reduced, as we have already stated.<sup>1</sup>

What things  
may be pre-  
scribed for ;

Secondly, as to the several species of things which may, or may not, be prescribed for: we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, &c.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had.<sup>k</sup> For a man shall not be said to prescribe, that he and his ancestors have used to hold the castle of Arundel; for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof than that of prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe for the periods mentioned in the stat. 2 & 3 W. IV.; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but usage. 2. A prescription, before the recent act, must always have been laid in him that was

and how and  
by whom.

[ 265 ] tenant of the fee. A tenant for life, for years, at will, or a copyholder, could not prescribe, by reason of the imbecility of their estates.<sup>1</sup> For, as prescription was usage, beyond time of memory, it was absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must have prescribed under cover of his lord's estate, and the tenant for life under cover of the tenant in fee simple. But now by the 2 & 3 W. IV. c. 71, s. 5, it is enacted, that in all pleadings wherein, before the passing of the act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement, in respect whereof the

<sup>1</sup> See *ante*, p. 30.

<sup>k</sup> Dr. & St. dial. 1, c. 8; Finch, 132. But see as to negative prescription of lands which arises from the several statutes of limitation; in consequence of which, no action can be

maintained for the recovery of corporeal property, after an uninterrupted possession of a certain number of years, 3 Cru. Dig. 490, 2d edit.

<sup>1</sup> 4 Rep. 81, 32.

same is claimed, for such of the periods as may be applicable to the case, and without claiming in the name or right of the owner of the fee. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant.

Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription.<sup>m</sup> 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felon's goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record.<sup>n</sup>

5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and those whose estate he holds,) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix, of an estate, with which the thing claimed has no connexion: but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross.<sup>o</sup> Therefore a man may prescribe, that he and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor: but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe

<sup>m</sup> 1 Ventr. 387; Cowp. 102.

<sup>n</sup> Co. Litt. 114.

<sup>o</sup> Litt. s. 183; Finch. L. 104.

Every prescription supposes a grant.

What arises by matter of record cannot be prescribed for.

Distinction between prescription in a *que estate* and for one's self and ancestors.

[ 266 ]

How estates  
gained by  
prescription  
descend.

in a *que estate* for a common *appurtenant* to a manor : but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition than as an acquisition *de novo* : and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors to whom he so prescribes ; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase : for every accessory followeth the nature of its principal.

## CHAPTER THE TWENTIETH.

### OF TITLE BY FORFEITURE.

[ 267 ]

**FORFEITURE** is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained. Forfeiture, definition of.

Lands, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-presentation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 5. By nonperformance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy; and 9. By insolvency. How lands may be forfeited.

I. The offences which induce a forfeiture of lands and tenements to the crown are principally the following six: I. By crimes and misdemeanors. 1. Treason. 2. Felony. 3. Misprision of Treason. 4. *Præmunire*. 5. Drawing a weapon on a judge, or striking any one in the presence of the King's principal courts of justice. But considerable alterations have recently been made in the law of forfeiture for crimes and misdemeanors, which have already been stated in a preceding chapter. [ 268 ]

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take; in the latter, from the incapacity of the alienor to grant. II. By alienation.

\* See *ante*, p. 209; and see further meanors, Rights of Persons, [209], and as to forfeiture for crimes and misdemeanors, Public Wrongs, ch. 29, *passim*.

1. By alien-  
ation in  
mortmain.

I. Alienation in *mortmain*, in *mortui manū*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain. In deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses, how new remedies were still the parent of new evasions, till the legislature at last, though with difficulty, hath obtained a decisive victory.

Corporations  
must have a  
licence from  
the crown

to enable  
them to pur-  
chase lands.

[ 269 ]

History of  
the contri-  
vances of the  
monks to  
evade the  
law, and of  
the statutes  
of mortmain.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary,<sup>b</sup> for corporations to have a license in mortmain from the crown to enable them to purchase lands: for as the King is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licenses of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest.<sup>c</sup> But, besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his license also, (upon the same feudal principles,) for the alienation of the specific land. And if no such license was obtained, the King or other lord might respectively enter on the lands so aliened in mortmain, as a forfeiture. The necessity of this license from the crown was acknowledged by the constitutions of Clarendon,<sup>d</sup> in respect of ad-

<sup>b</sup> F. N. B. 121.

<sup>c</sup> Selden. Jan. Angl. l. 2, s. 45.

<sup>d</sup> *Ecclesia de feudo domini regis non*

*possunt in perpetuum dari, absque assensu et consensione ipsius.* c. 2,

A. D. 1164.



vowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations.\* Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a license could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly-acquired signiory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their signiories, their escheats, wardships, reliefs, and the like: and therefore, in order to prevent this, it was ordered by the second of King Henry III.'s great charters,<sup>f</sup> and afterwards by that printed in our common statute-book, that all such attempts should be void, and the land forfeited to the lord of the fee.<sup>g</sup> But, as this prohibition [ 270 ] extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes,<sup>h</sup> in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture: or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute

\* Rights of Persons, [384].

<sup>f</sup> A. D. 1217, cap. 43, edit. Oxon.

<sup>g</sup> Mag. Cart. 9 Hen. 3, c. 36.

<sup>h</sup> 2 Inst. 75.

<sup>g</sup> Hen. III.  
c. 75.

7 Edw. I.  
statute de  
religiosis.

*de religiosis*, 7 Edw. I., which provided, that *no person*, religious or other whatsoever, should buy or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the King, might enter thereon as a forfeiture. This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion made no defence, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law, upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which were until lately the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the King, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter<sup>1</sup> in case the tenants set up crosses upon their lands (the badges of knight's templars and hospitallers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I. abolished all sub-infeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord,<sup>2</sup> a proviso was inserted<sup>1</sup> that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining

Invention of  
common re-  
coveries.

13 Edw. I. c.  
32.

18 Edw. I. c.  
3.

<sup>1</sup> Cap. 33.

<sup>2</sup> 2 Inst. 501.

<sup>1</sup> Cap. 3.

the King's license by writ of *ad quod damnum* was marked out by the statute 27 Edw. I. st. 2, it was further provided by statute 34 Edw. I. st. 3, that no such licence should be effectual, without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity: for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use* of the religious houses, thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Ric. II. c. 5, enacts that the lands which had been so purchased to uses should be amortised by license from the crown, or else be sold to private persons: and that for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land adjoining to churches, and consecrating them by the name of churchyards, such subtile imagination is also declared to be within the compass of the statute of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery, lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10, declares, that all future grants of lands for any of the purposes aforesaid,

34 Edw. I.  
st. 3.

Invention of  
uses.

[ 272 ]

15 Ric. II.  
c. 5.

23 Hen. VIII.  
c. 10.

if granted for any longer term than twenty years, shall be void.

Power of the crown to grant license of mortmain.

[ 273 ]

Confirmed by the 7 & 8 W. III. c. 37.

But, during all this time, it was in the power of the crown, by granting a license of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3, c. 3. But, as doubts were conceived at the time of the revolution how far such license was valid,<sup>m</sup> since the kings had no power to dispense with the statutes of mortmain by a clause of *non obstante*,<sup>n</sup> which was the usual course, though it seems to have been unnecessary;<sup>o</sup> and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III., c. 37, that the crown, for the future, at its own discretion, may grant licenses to aliene or take in mortmain, of whomsoever the tenements may be holden.

1 & 2 P. & M. c. 8.

After the dissolution of monasteries under Henry VIII., though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them, as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M., c. 8; and during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any license whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3, repealed but extended by subsequent statutes;<sup>p</sup> that all benefices under a certain amount per annum may be augmented by the purchase of lands, without license of mortmain in either case; and the like provision hath been since made, in favour of the governors of Queen Anne's Bounty.<sup>q</sup> And by the statute 43 G. III., c. 137, any

<sup>m</sup> 2 Hawk. P. C. 391.

<sup>n</sup> Stat. 1 W. & M. st. 2, c. 2.

<sup>o</sup> Co. Litt. 99.

<sup>p</sup> 29 Car. 2, c. 8. 1 & 2 W. 4, c. 45. And 1 & 2 Vict. c. 107. 3 & 4

Vict. c. 113. And see Rights of Persons, ch. 11.

<sup>q</sup> Stat. 2 & 3 Ann, c. 11, and see 1

Vict. c. 20. 2 & 3 Vict. c. 49. 3 Vict. c. 20. And Rights of Persons, [285].

real or personal property may be given by deed enrolled, or by will, for the augmentation of this bounty, notwithstanding the statutes of mortmain, including the 9 G. 2, c. 36, mentioned below. It hath also been held,<sup>r</sup> that the statute 23 Hen. VIII., before mentioned, did not extend to anything but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school,<sup>s</sup> an hospital, or any other *charitable* uses. But as it was apprehended from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political end of the statutes of mortmain; it is therefore enacted, by the statute 9 Geo. II., c. 35, that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless by [ 274 ] deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the court of chancery within six months after its execution, (except stock in the public funds, which may be transferred within six months previous to the donor's death,) and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act; but such exemption was granted with this proviso, that no college should be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations. But this proviso has been repealed by the statute 45 G. III., c. 101; and a similar exemption has been made in favour of the British Museum.<sup>t</sup>

2. Secondly, alienation *to an alien* is also a cause of forfeiture to the crown of the lands so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land,<sup>u</sup> but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property.<sup>w</sup>

<sup>r</sup> 1 Rep. 24.

<sup>s</sup> The giving land for schools is facilitated by stat. 6 & 7 W. 4, c. 70.

<sup>t</sup> 5 Geo. 4, c. 39.

<sup>u</sup> See pp. 292, 293.

<sup>w</sup> See Rights of Persons, [372].

<sup>2</sup> Alienation to an alien.

3. Alienations by particular tenants.

[ 275 ]

3. Lastly, alienations by *particular tenants*, when they are greater than the law entitles them to make, and divest the remainder or reversion,<sup>1</sup> are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life aliens by feoffment, fine, or recovery, (when these last assurances existed,) for the life of another, or in tail, or in fee; these being estates which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion.<sup>2</sup> For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feudal connexion and dependence: it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one; and it tends in its consequence to defeat and divest the remainder or reversion expectant: as therefore that is put in jeopardy by such act of the particular tenant, it is but just that, upon discovery, the particular estate should be forfeited and taken from him, who has shown so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has, by his own act, determined and put an entire end to his own original interest: and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. But if a tenant for life aliene by lease and release, or bargain and sale, as no estate passes by these conveyances but what may legally pass, it will be no forfeiture; and alienation in fee by *dead* by tenant for life of anything which lies in grant, as an advowson, &c., does not amount to a forfeiture, but conveyance by fine of such an estate would have been a forfeiture. The fine of an equitable tenant for life would not work a forfeiture.<sup>3</sup> The same law which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *dis-*

Discontinuance.

<sup>1</sup> Co. Litt. 251.

<sup>2</sup> Litt. s. 415.

<sup>3</sup> Co. Litt. 251 b; 1 Prest. Conv. 202.

*continuance* (as it is called<sup>y</sup>) of the estate-tail, which the issue may now avoid by entering on the lands:<sup>z</sup> for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law.<sup>a</sup> For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer*: as where a tenant, who holds of any lord, neglects to render him the due services, and upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord,<sup>b</sup> upon reasons most apparently feudal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer: if he claims any greater estate than was granted him at the first infeudation, or takes upon himself those rights which belong only to tenants of a superior class;<sup>c</sup> if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like;<sup>d</sup> such behaviour amounts to a forfeiture of his particular estate. Effect of disclaimer.

III. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron, III. By lapse

<sup>y</sup> Private Wrongs, ch. 10.

<sup>z</sup> Litt. s. 595, 6, 7. 3 & 4 W. 4, c. 27, s. 39, and Private Wrongs, ch. 10.

<sup>a</sup> Co. Litt. 288.

<sup>b</sup> Finch. 270, 271.

<sup>c</sup> Co. Litt. 252.

<sup>d</sup> Ibid. 253.

who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. The right of lapse was first established about the time (though not by the authority<sup>e</sup>) of the council of Lateran,<sup>f</sup> which was in the reign of our Henry the Second, when the bishops first began to exercise universally the right of institution to churches. And therefore, where there is no right of institution, there is no right of lapse; so that no donative can lapse to the ordinary,<sup>g</sup> unless it hath been augmented by the Queen's bounty.<sup>h</sup> And no right of lapse can accrue, when the original presentation is in the crown.<sup>i</sup>

When a title  
by lapse ac-  
crues.

[ 277 ]

The term, in which the title to present by lapse accrues from the one to the other successively, is six *calendar* months;<sup>k</sup> (following in this case the computation of the church, and not the usual one of the common law;) and this exclusive of the day of avoidance.<sup>l</sup> But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in;<sup>m</sup> for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk.<sup>n</sup> For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice, and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop.<sup>o</sup> For he had no perma-

<sup>e</sup> 2 Roll. Abr. 386, pl. 10.

<sup>f</sup> Bracton, l. 4, tr. 2, c. 3.

<sup>g</sup> Bro. Abr. tit. *Quare Impedit*, 181; Cro. Jac. 518.

<sup>h</sup> Stat. 1 Geo. 1, st. 2, c. 10.

<sup>i</sup> Stat. 17 Edw. 2, c. 8; 2 Inst. 273.

<sup>k</sup> Rep. 62; Regist. 42.

<sup>l</sup> 2 Inst. 361. But it has been doubted whether the day is exclusive, 15 Ves. 255.

<sup>m</sup> Gibs. Cod. 769.

<sup>n</sup> 2 Inst. 273.

<sup>o</sup> 2 Roll. Abr. 368.

A. D  
1154. 1189.



nent right and interest in the advowson, as the patron hath, but merely a temporary one ; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference ; and the patron shall never recover his right till the king has satisfied his turn by presentation : for *nullum tempus occurrit regi*.<sup>p</sup> And therefore it may seem, as if the church might continue void for ever, unless the king shall be pleased to present ; and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands, of as it were compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed, by presenting another, may turn out the patron's clerk ; or, after induction, may remove him by *quare impedit* ; but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation.<sup>q</sup>

In case the benefice becomes void by death, or cession, [ 278 ] through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril ; for these are matters of equal notoriety to the patron and ordinary : but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, or from being under the proper age, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of lapse.<sup>r</sup> Neither shall any lapse thereby accrue to the metropolitan or to the king ; for it is universally true, that neither the archbishop nor the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time ; for the first step or beginning faileth, *et quod non habet principium, non habet finem*.<sup>s</sup> If the bishop refuse or neglect to examine and admit the patron's

<sup>p</sup> Dr. & St. d. 2, c. 36 ; Cro. Car. 355.

<sup>q</sup> 7 Rep. 28 ; Cro. Eliz. 44.

<sup>r</sup> 4 Rep. 75 ; 2 Inst. 632 ; 44 G. 3, c. 43.

<sup>s</sup> Co. Litt. 344, 345.

clerk, without good reason assigned or notice given, he is stiled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong.<sup>p</sup> Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided.<sup>q</sup>

IV. By simony.

IV. By *simony*, the right of presentation to a living is forfeited and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as Sir Edward Coke observes,<sup>r</sup> it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However it was not an offence punishable in a criminal way at the common law;<sup>s</sup> it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they divest the corrupt patron of the right of presentation, and vest a new right in the crown.

Statutes relating to simony. 31. Eliz. c. 6.

1 W. & M. c. 16.

By the statute 31 Eliz. c. 6, it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice; and the crown shall present to it for that turn only. But if the presentee dies, without being convicted of such simony in his life-time, it is enacted by statute 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any

<sup>p</sup> 2 Roll. Abr. 369.

<sup>q</sup> Co. Litt. 344.

<sup>r</sup> 3 Inst. 156.

<sup>s</sup> Moor. 564.

other innocent patron, on pretence of lapse to the crown, or otherwise. Also by the statute 12 Ann, stat. 2, c. 12,<sup>19 Ann, stat. 2, c. 12.</sup> if any person, for money or profit, shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract: and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

Upon these statutes many questions have arisen, with regard to what is, and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony;<sup>What is and what is not simony.</sup> this being expressly in the face of the statute. There has however been some conflict in the authorities, as to the purchase of a next presentation where the incumbent is *in extremis*. In one case,<sup>Whether a next presentation can be purchased when the incumbent is in extremis.</sup> it was held, that if the clerk was not privy to the contract, it would be valid. But in a latter case,<sup>7</sup> a similar transaction was held by the Court of King's Bench to be simoniacal, and consequently void; and that the privity of the clerk was not essential to make it so. But this decision has been reversed by the House of Lords, who directed a question for the opinion of the Judges; and *Best, C. J.*, delivered the unanimous opinion of the Judges of the Courts of Common Pleas and Exchequer, to be, that if the clergyman were not privy to the agreement, the sale, under the above circumstances, could not be simoniacal; and that the right to sell the presentation continues as long as the incumbent is in existence.<sup>8</sup> 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of Queen Anne:<sup>9</sup> and now, by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony. But, 3. [ 280 ]

<sup>1</sup> Cro. Eliz. 788; Moor. 914.

C. 635.

<sup>2</sup> *Barret v. Glubb*, 2 W. Bla. 1052;  
Bac. Abr. Simony, A. S. C.

<sup>3</sup> 6 Bing. 1; and 2 Bli. 1, N. S.  
See *Alston v. Atlay*, 6 N. & M. 686.

<sup>4</sup> *Fox v. Bishop of Chester*, 2 B. &

<sup>5</sup> Hob. 165.

in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him.<sup>a</sup> 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron: but the clerk, who is innocent, does not incur any disability or forfeiture.<sup>a</sup> 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal,<sup>b</sup> provided the patron or his relations be not benefitted thereby;<sup>c</sup> for this is no corrupt consideration, moving to the patron. 6. That bonds of resignation, in case of non-residence or taking any other living, are not simoniacal:<sup>d</sup> there being no corrupt consideration herein, but such only as is for the good of the public. And it was at one time held, that bonds, both of general and special resignation, were valid; but after very great discussion and many conflicting decisions, it has been settled,<sup>e</sup> that bonds, as well of special as general resignation, are void. But, nevertheless, it has recently been enacted, that a bond may be taken to secure the resignation of a living in favour of any one person whomsoever, and in favour of any two persons, if they are the near relations of the patron. But all bonds of this kind, not provided for by this statute, are void.<sup>f</sup>

As to bonds  
of resigna-  
tion.

[ 281 ] V. The next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly by deed at its original creation, or impliedly by law, from a principle of natural reason. Both which we considered at large in a former chapter.<sup>g</sup>

VI. By waste. VI. I therefore now proceed to another species of forfeiture, *viz.* by *waste*. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the injury of the inheritance.<sup>h</sup>

Waste is either *voluntary*, which is a crime of commis-

<sup>a</sup> Cro. Eliz. 686; Moor. 916. See *ante*, p. 324.

<sup>b</sup> 3 Inst. 154; Cro. Jac. 385.

<sup>c</sup> Noy. 142.

<sup>d</sup> Stra. 534,

<sup>e</sup> Cro. Car. 180.

<sup>f</sup> *Fletcher v. Lord Sondes*, 2 B. & A. 835; 3 Bing. 501; and 1 Bli. 144, N. S.

<sup>g</sup> 9 Geo. 4, c. 94.

<sup>h</sup> See chap. 12, p. 185.

<sup>i</sup> Co. Litt. 53; 3 Atk. 95, 754.

sion, as by pulling down a house: or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste.<sup>1</sup> Therefore removing wainscot, floors, or other things, once fixed to the freehold of a house, is waste.<sup>k</sup> But during the term, the lessee may move marble chimney pieces, &c., which he has erected, but he cannot remove them after the term. If a house be destroyed by tempest, lightning, or the like, which is the act of providence, it is no waste: but it was otherwise, if the house were burnt by the carelessness or negligence of the lessee; though now by the statute 6 Ann, c. 31, re-enacted by the 14 Geo. III. c. 78, s. 86, no action will lie against a tenant for an accident of this kind. But the lessee will be liable for rent, if he has made no agreement on the subject, as well during the time that the house remains unbuilt as afterwards.<sup>l</sup> Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance.<sup>m</sup> Timber also is part of the inheritance.<sup>n</sup> Such are oak, ash, and elm in all places, and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste.<sup>o</sup> But underwood the tenant may cut down at any seasonable time that he pleases;<sup>p</sup> and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions.<sup>q</sup> The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland, or to turn arable or woodland into meadow or pasture; are all of them waste.<sup>r</sup> For, as

Waste is voluntary or permissive.

What will be considered waste.

[ 282 ]

<sup>1</sup> Hetl. 35.

<sup>k</sup> 4 Rep. 64. See *Elwes v. Maw*, 3 East, 38.

<sup>l</sup> *Balfour v. Weston*, 1 T. R. 312; *Holzapfel v. Baker*, 18 Ves. 119.

<sup>m</sup> Co. Litt. 53.

<sup>n</sup> 4 Rep. 62.

<sup>o</sup> Co. Litt. 53.

<sup>p</sup> 2 Roll. Abr. 817.

<sup>q</sup> Co. Litt. 41.

<sup>r</sup> Hob. 296.

Sir Edward Coke observes,<sup>1</sup> it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value.<sup>4</sup> To open the land to search for mines of metal, coal, &c., is waste; for that is a detriment to the inheritance:<sup>5</sup> but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use;<sup>6</sup> for it is now become the mere annual profit of the land. These three are the general heads of waste, *viz.* in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

Who may be  
punished for  
waste.

Let us next see, who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*"<sup>2</sup> But in our ancient common law the rule was by no means so large: for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save [ 283 ] only in three persons; guardian in chivalry, tenant in dower, and tenant by the curtesy;<sup>7</sup> and not in tenant for life or years.<sup>8</sup> And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee: and if he did not, it was his own default. But, in favour of the owners of the inheritance, the statutes of Marlbridge, 52 Hen. III. c. 23, and of Gloucester, 6 Edw. I. c. 5, provided

<sup>1</sup> 1 Inst. 53.

<sup>4</sup> 1 Lev. 309.

<sup>5</sup> 5 Rep. 12.

<sup>6</sup> Hob. 295.

<sup>8</sup> Wright, 44.

<sup>7</sup> It was however a doubt whether

waste was punishable at the common law in tenant by the curtesy. Regist. 72; Bro. Abr. tit. Waste, 88; 2 Inst. 301.

<sup>2</sup> 2 Inst. 299.

that the writ of waste shall not only lie against tenants by the law of England, (or curtesy,) and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above six hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him, for waste committed. But although this clause in a lease enables the tenant to cut down trees or open mines, it will not sanction destructive or malicious waste, such as cutting timber which serves for the shelter or ornament of the estate.<sup>a</sup> Tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes.<sup>b</sup> Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account:<sup>c</sup> but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor.<sup>d</sup>

The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages;<sup>e</sup> except in the case of a guardian, who also forfeited his wardship<sup>f</sup> by the provisions of the great charter:<sup>g</sup> but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that hath the inheritance. The expression of the statute is, "he shall forfeit the *thing* which he hath wasted;" and it hath been determined, that under these words the *place* is also included.<sup>h</sup> And if waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited;<sup>i</sup> because it is impracticable for the reversioner

The remedies  
against  
waste.

[ 284 ]

<sup>a</sup> 2 Vern. 788; 5 Bac. Abr. 491.

<sup>b</sup> Co. Litt. 27; 2 Roll. Abr. 826.

823.

<sup>c</sup> Co. Litt. 54.

<sup>d</sup> F. N. B. 58.

<sup>e</sup> 2 Inst. 146.

<sup>f</sup> *Ibid.* 300.

<sup>g</sup> 9 Hen. 3, c. 4.

<sup>h</sup> 2 Inst. 303.

<sup>i</sup> Co. Litt. 54.

to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood (or perhaps in one room of a house, if that can be conveniently separate from the rest) that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner.<sup>k</sup> But this remedy at common law has long fallen into disuse, the ends of justice being found to be better answered by a Court of Equity, which grants an injunction to restrain the waste, and an account of the profits made; and very recently, by the 3 & 4 W. IV. c. 27, s. 36, the writ of waste has been abolished. An injunction to restrain waste will be granted at the suit not only of a remainder-man in fee-simple, or fee-tail, but also of a remainder-man for life, or of trustees to preserve contingent remainders.<sup>l</sup>

VII. By  
breach of the  
customs of  
the manor.

VII. A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste, whereupon the lord may seize them without any presentment by the homage;<sup>m</sup> but also to peculiar forfeitures, annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. And we may observe that, as these tenements were originally holden by the lowest and most abject vassals, the marks of feudal dominion continue much the strongest upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feudal law, and were denominated *feloniæ, per quas vassalus amitteret feudum*,<sup>n</sup> still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service;<sup>o</sup> *si dominum deservire noluerit*;<sup>p</sup> by disclaiming to hold of the lord, or swearing himself not his copyholder;<sup>q</sup> *si dominum ejuravit, i. e. negavit se a domino feudum habere*;<sup>r</sup> by neglect to be admitted

<sup>k</sup> 2 Inst. 304.

<sup>l</sup> *Perrott v. Perrott*, 3 Atk. 95;  
*Stansfield v. Habergham*, 10 Ves. 281.

<sup>m</sup> 2 Ventr. 38; Cro. Eliz. 499.

<sup>n</sup> *Feud.* l. 2, t. 26, in calc.

<sup>o</sup> 3 Leon. 108; Dyer, 211.

<sup>p</sup> *Feud.* l. 1, t. 21

<sup>q</sup> Co. Copy. s. 57.

<sup>r</sup> *Feud.* l. 2, t. 34, & t. 36, s. 3:



tenant within a year and a day ;<sup>a</sup> *si per annum et diem cessaverit in petenda investitura* ;<sup>b</sup> by contumacy in not appearing in court after three proclamations ;<sup>c</sup> *si a domino ter citatus non comparuerit* ;<sup>d</sup> or by refusing when sworn of the homage to present the truth according to his oath ;<sup>e</sup> *is pares veritatem noverint, et dicant se nescire, cum scient*.<sup>f</sup> In these, and a variety of other cases, which it is impossible here to enumerate, the forfeiture does not strictly accrue to the lord till after the offences are presented by the homage, or jury of the lord's court baron ;<sup>g</sup> *per laudamentum parium suorum* ;<sup>h</sup> or, as it is more fully expressed in another place,<sup>i</sup> *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quæ sit laudanda per judicium parium suorum*. But in none of these cases does presentment by the homage now seem to be necessary, because as a matter of prudence, the lord will procure it.<sup>d</sup> [ 285 ]

VIII. The eighth method, whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt ; which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined ; a trader, who secretes himself, or does certain other acts, tending to defraud his creditors. Who shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter, when we shall endeavour more fully to explain its nature, as it most immediately relates to personal goods and chattels.<sup>e</sup> I shall only here observe the manner in which the property of lands and tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission or fiat of bankruptcy has been awarded and issued against him. VIII. By bankruptcy.

By the statute 6 G. IV. c. 16, (by which the former acts [ 286 ]

<sup>a</sup> Plowd. 372.

<sup>b</sup> Feud. l. 2, t. 24.

<sup>c</sup> 8 Rep. 99 ; Co. Copy. s. 57.

<sup>d</sup> Feud. l. 2, t. 22.

<sup>e</sup> Co. Copy. s. 57.

<sup>f</sup> Feud. l. 2, t. 58.

<sup>g</sup> Co. Copy. s. 58.

<sup>a</sup> Feud. l. 1, t. 21.

<sup>b</sup> Ibid. t. 22.

<sup>c</sup> i. e. *arbitranda, definienda*. Du Fresne IV. 79.

<sup>d</sup> 1 Scriv. on Cop. 537, 3rd edit.

<sup>e</sup> Chap. 33.

Provisions in  
the Bank-  
rupt Acts.

on the subject are consolidated,) s. 12, which re-enacts s. 7 of the stat. 45 G. III. c. 124, it is enacted, that under a commission, the commissioners shall have full power to take the order and direction of all the bankrupt's lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold as freehold, as he had in his own right before he became bankrupt; and also all such interest in any such lands, tenements, and hereditaments, as such bankrupt might lawfully depart withal, and to make sale thereof, or otherwise order the same, for the satisfaction and payment of his creditors. And, by s. 64, founded on the stat. 13 Eliz. c. 7, s. 11, and 5 G. II., c. 30, s. 20, it was further enacted, that the commissioners should, by deed indented and enrolled, convey to his assignees, for the benefit of his creditors, all lands, tenements, and hereditaments, (except copy or customary-hold,) in any part of the dominions or colonies belonging to his Majesty, to which such bankrupt was entitled. But by the stat. 1 & 2 W. IV. c. 56, s. 26, this conveyance by the commissioners to the assignees is rendered unnecessary; and the real estate of a bankrupt vests in his assignees by virtue of their appointment. By the 68th sec. (6 G. IV.,) it is enacted, that the commissioners shall have power to make sale of any copyhold or customary-hold lands, or of any interest to which a bankrupt is entitled therein. By s. 81, which re-enacts the 46 G. III. c. 135, s. 1, and the 49 G. III. c. 121, s. 2, it is enacted that all conveyances by, and all contracts by and with any bankrupt, *bonâ fide* made and entered into more than *two calendar months* before the issuing of the commission against him, and all executions, and all attachments against the lands and tenements of such bankrupt, executed or levied more than *two calendar months* before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person so dealing with such bankrupt had not, at the time of such conveyance, contract, dealing, or transaction, notice of any prior act of bankruptcy by the said bankrupt committed. But by stat. 2 Vict. c. 11, s. 12, all such conveyances "made and executed before the date and issuing of the fiat against such bankrupt," shall be valid, notwithstanding any prior

act of bankruptcy, provided the person so dealing had no notice; and by stat. 2 & 3 Vict. c. 29, s. 1, all *bona fide* contracts by and with a bankrupt, made and entered into before the date and issuing of the fiat, and all executions and attachments against the lands and tenements of such bankrupt, executed or levied before the date and issuing of the fiat shall be valid, notwithstanding any prior act of bankruptcy, provided the person at whose suit the execution or attachment was issued<sup>e</sup> had no notice.<sup>f</sup> By the 83rd sect. (6 G. IV., c. 16,) it is enacted, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, (if an act of bankruptcy had been actually committed before the issuing of the commission,) if the adjudication has been notified in the London Gazette, and the persons affected by such notice may reasonably be presumed to have seen it. But, the 86th section, re-enacted by 2 Vict. c. 11, s. 13, enacts, that no purchase from any bankrupt *bona fide* and for valuable consideration, though the purchaser had notice at the time of such purchase of any act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission shall have been sued out within twelve calendar months after such an act of bankruptcy. And by the 87th section it is enacted, that no title to any real estate sold under a commission or order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same, within twelve calendar months from the issuing thereof.

By the 65th section of the 6 G. IV. c. 16, it was enacted that the Commissioners of Bankrupts should make sale of any land of which the bankrupt was seised in tail, and every such deed should bar all persons whom the bankrupt might have barred by fine or recovery; but by the recent act for abolishing fines and recoveries, (3 & 4 W. IV., c. 74, s. 55,) this section is repealed, and it is enacted

Bankrupt tenants in tail. Provisions of 3 & 4 W. IV. c. 74.

<sup>m</sup> As to construction of this stat. see *Edwards v. Lawley*, 8 Dowl. 234; *Moore v. Phillips*, 9 Dowl. 294; and

*Hall v. Wallace*, 7 M. & W. 352.

<sup>f</sup> See further, *post*, ch. 33.

(s. 56), that the commissioners in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, may by deed dispose of the lands of such bankrupt to a purchaser for the benefit of the creditors, and if the person who is the protector<sup>s</sup> of the settlement shall not concur therein, the commissioner may dispose of as large an estate as the tenant in tail could have done if he had not become bankrupt. And where a tenant in tail, entitled to a base-fee, becomes bankrupt, and there is no protector, the commissioners may dispose of the lands to a purchaser (s. 57). The deed of disposition, if of freeholds, must be enrolled in Chancery, and if of copyholds, must be entered on the court rolls, and also the deed of consent of the protector (s. 59): and all acts of a bankrupt tenant in tail shall be void against any disposition under the act by the commissioner (s. 63).

By virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred to his assignees, without his participation or consent.

IX. By insolvency.

IX. The ninth and last species of forfeiture is that of *insolvency*, which is of very recent origin. Insolvency, or the inability to satisfy all just demands, indeed, does not necessarily work a forfeiture of the debtor's lands and tenements, but it is here to be understood as that species of insolvency which is provided for by certain statutes made for that purpose. They have recently been consolidated by stat. 7 G. IV. c. 57, which has been in part re-enacted and greatly amended by stat. 1 & 2 Vict. c. 110. Under the 7 G. IV. c. 57, s. 10, which is re-enacted by stat. 1 & 2 Vict. c. 110, s. 35, any person in actual custody for debt for fourteen days, may apply by petition to the Court of Insolvent Debtors<sup>b</sup> for his discharge; and by 1 & 2 Vict. c. 110, s. 37, at the time of filing the petition the court may vest in its provisional assignee all the real estate of the prisoner, and such order shall vest all his real estate, as well present as future, in such provisional assignee. Assignees may be then appointed by the court (s. 45); and under the former act it was necessary that the provisional assignee should convey the real estate of the

<sup>s</sup> As to the protector of a settlement, see *post*, ch. 23.

<sup>b</sup> As to the Court of Insolvent Debtors, see *Private Wrongs*, ch. 4.

prisoner to such assignees, but under s. 45 of 1 & 2 Vict. c. 110, the estate vested in the provisional assignee by such order as aforesaid, shall without any conveyance vest in the assignees in trust for the benefit of the creditors of the prisoner. The sale of his estate may then take place immediately, and the assignees may surrender or convey copyhold or customary estates (s. 47). Should the prisoner not petition, his creditors may obtain an order from the court for vesting his estate in the provisional assignee of the court (s. 36) ; and by s. 38 of this important statute, the main object of which is to abolish, so far as possible, imprisonment for debt, power is given to the court to direct the prisoner to be discharged on his finding sureties to attend at the time and place of hearing. Further, by stat. 5 & 6 Vict. c. 116, any person not being a trader, or being a trader owing less than £300, on giving and publishing the notice required by the act, may present a petition to the Court of Bankruptcy, stating the debts owing by and to him, and on the presentation of this petition, all the estate and effects of the petitioner shall vest in the official assignee.<sup>1</sup>

Under these statutes, therefore, the whole real estate of the insolvent is vested in his assignees either by his own act, or by that of his creditors, for the benefit of the latter.

<sup>1</sup> See further, as to this statute, *Private Wrongs* [290], and *post*, chap. 83.

## CHAPTER THE TWENTY-FIRST.

[ 287 ]

## OF TITLE BY ALIENATION.

Title by alienation, what is comprised under it.

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense : under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another : whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties.

Its history and progress.

The means of taking estates by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law,<sup>a</sup> a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord ; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts ; for, if he might, the feudal restraint of alienation would have been easily frustrated and evaded.<sup>b</sup> And, as he could not aliene in his life-time, so neither could he by will defeat the succession, by devising his feud to another family ; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir.<sup>c</sup> And therefore it was very usual in ancient feoffments to express, that the alienation was made by consent of the heirs of the feoffor ; or sometimes for the

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<sup>a</sup> See pp. 59, 60.

<sup>b</sup> *Feud.* l. 1, t. 27.

<sup>c</sup> *Co. Litt.* 94 ; *Wright*, 168.

heir apparent himself to join with the feoffor in the grant.<sup>d</sup> And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seising of his cattle by the lord of a neighbouring clan.<sup>e</sup> This consent of the vassal was expressed by what was called *attorning*,<sup>f</sup> or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete:<sup>g</sup> which was also an additional clog upon alienations.

But by degrees this feudal severity hath worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king Henry the First, which allowed a man to sell and dispose of lands which he himself had purchased, for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors:<sup>h</sup> a doctrine which is countenanced by the feudal constitutions themselves:<sup>i</sup> but he [ 289 ]

<sup>d</sup> Madox, *Formul. Angl.* No. 316, 319, 427.

<sup>e</sup> Gilb. Ten. 75.

<sup>f</sup> The same doctrine and the same denomination prevailed in Bretagne—*possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacra-*

*mento novo item domino acquirenti obstringebat; idque jussu auctoris.* D'Argentre *Antiq. Consuet. Brit.* apud Dufresne, i. 819, 820.

<sup>g</sup> Litt. s. 551.

<sup>h</sup> *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.* LL. Hen. 1, c. 70.

<sup>i</sup> Feud. l. 2, t. 39.

was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate.<sup>k</sup> Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but if his assigns were not specified in the purchase deed, he was not empowered to aliene:<sup>l</sup> and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir.<sup>m</sup> By the great charter of Henry III.<sup>n</sup> no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land.<sup>o</sup> But these restrictions were in general removed by the statute of *quia emptores*,<sup>p</sup> whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion.<sup>q</sup> And even these tenants *in capite*, were by the statute 1 Edw. III. st. 2, c. 12, permitted to aliene, on paying a fine to the king.<sup>r</sup> By the temporary statutes 7 Hen. VII. c. 3, and 3 Hen. VIII. c. 4, all persons attending the king in his wars were allowed to aliene their lands without license, and were relieved from other feudal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as statute Westm. 2, which<sup>s</sup> subjected a *moiety* of the tenant's lands to executions for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9, and in other similar recognizances by statute 23 Hen. VIII. c. 6. And now,<sup>t</sup> the whole of them is not only subject

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<sup>k</sup> *Si questum tantum habuerit is, qui partem terra sua donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum heredem exheredare.* Glanvil. l. 7, c. 1.

<sup>l</sup> *Mirr.* c. 1, s. 8. This is also borrowed from the feudal law. *Feud.* l. 2, t. 48.

<sup>m</sup> *Mirr. Ibid.*

<sup>n</sup> 9 Hen. 3, c. 32.

<sup>o</sup> Dalrymple of Feuds, 95.

<sup>p</sup> 18 Edw. 1, c. 1.

<sup>q</sup> See page 74, 94.

<sup>r</sup> 2 Inst. 67.

<sup>s</sup> 18 Edw. 1, c. 18.

<sup>t</sup> See *ante*, pp. 304, 331.



to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the payment of simple contract as well as specialty debts,\* and by virtue of the several statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer: that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last, they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Ann. c. 16, nor shall, by statute 11 Geo. II. c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

In examining the nature of alienation, let us first inquire, briefly, who may aliene and to *whom*; and then more largely, *how* a man may aliene, or the several modes of conveyance.

1. Who may aliene, and to whom: or, in other words, who is capable of conveying, and who of purchasing. And herein we must consider rather the incapacity, than capacity of the several parties: for all persons in *possession* are *prima facie* capable both of conveying and purchasing,† unless the law has laid them under any particular disabilities. But, if a man has only in him the right of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed:‡ but he has recently been empowered to devise it.§ And reversions and vested remainders may be granted; because the possession of the particular

Who may or is to be alien.  
"Who may not"

\* 3 & 4 W. 4, c. 104.

† But it is a rule of law that no person can vest an estate in another against his will, and consequently, if a grantee, lessee, or devisee, refuses the estate intended to be vested in him, the grant, lease, or devise, will be void. *Thompson v. Leech*, 2 Vent. 198. An estate granted or devised to a person for his own benefit is seldom disclaimed,

but it often happens that persons who are made grantees or devisees in trust for others decline to act, in which case they may disclaim by deed. See *Nicolson v. Wordsworth*, 2 Swanst. 372. *Townson v. Tickell*, 3 B. & A. 31. *Smith v. Smith*, 6 B. & C. 112. *Begbie v. Crook*, 2 Bing. N. C. 70.

‡ Co. Litt. 214.

§ 1 Vict. c. 26, s. 3.

tenant is the possession of him in reversion or remainder: but *contingencies*, and mere *possibilities*, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger at law, unless coupled with some present interest,\* although they may be assigned in equity,\* and bound at law by way of estoppel.<sup>b</sup>

Attainted persons, &c.

[ 291 ] Persons attainted of treason or murder are incapable of conveying, from the time of the offence committed, provided attainder follows:<sup>c</sup> for such conveyance by them may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold*: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime.<sup>d</sup> But other felonies, since the stat. 54 Geo. III. c. 145, seem to leave to the offenders the power of disposing of their estates to be enjoyed after their deaths.\* So also corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

Corporations

All lay civil corporations might aliene their lands as freely as individuals, except for election purposes;<sup>f</sup> but by the stat. 4 & 5 W. IV. c. 76, s. 94, they are restrained from selling or mortgaging any real estate, except in pursuance of some agreement entered into on or before the 5th of June, 1835, by the body corporate; but when the council shall deem it expedient to sell, they may represent the case to the treasury, and with the approbation of three of the Lords, may sell on such terms as they approve;

\* Shep. Touch. 238, 239, 322; 11 Mod. 152; 1 P. Wms. 574; Stra. 132.

<sup>a</sup> See *Wright v. Wright*, 1 Ves. 411; *Hinde v. Blake*, 3 Bea. 234. *Metcalf v. Archbishop of York*, 1 Myl. & C. 547; and *ante*, p. 198, and *post*, ch. 24.

<sup>b</sup> *Weale v. Lower*, Pollex. 80; *Bensley v. Burdon*, 2 Sim. & Stu. 519.

<sup>c</sup> Co. Litt. 42; as to the present opo-

ration of attainder, see *ante*, p. 295.

<sup>d</sup> Co. Litt. 2.

<sup>e</sup> 1 Burt. Comp. (191.) And until office found for the king or entry made by the lord, the land remains in the offender, and his alienation is good against all persons except the king or the lord, who may defeat it. *Doe v. Prichard*, 5 Ad. & El. 765.

<sup>f</sup> 2 & 3 W. 4, c. 69, s. 3.

but notice of the application must be given.<sup>s</sup> Ecclesiastical and eleemosynary corporations are restrained by several statutes from every mode of alienation except that of leasing, and exercise that power under considerable restrictions, as will hereafter be seen.

Idiots and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. Thus, a feoffment made by a lunatic in person is not even voidable by himself:<sup>h</sup> and if he were allowed to levy a fine, or to suffer a recovery in person, no evidence of his disability can be admitted, as that would contradict the record.<sup>i</sup> But all other acts by an idiot or lunatic, except in a lucid interval, are absolutely void.<sup>k</sup> The king on behalf of an idiot, may avoid his grants or other acts.<sup>l</sup> But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant; for that no man shall be allowed to stultify himself or plead his own disability although he may plead *non est factum* and show the insanity in evidence.<sup>m</sup> The progress of this motion is somewhat curious. In the time of Edward I., *non compos* was a sufficient plea to avoid a man's own bond:<sup>n</sup> and there is a writ in the register<sup>o</sup> for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suæ, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity:<sup>p</sup> and, afterwards, a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting, whether as the

Idiots, infants, and persons under duress.

<sup>s</sup> See also 6 & 7 W. 4, c. 104, s. 2.

<sup>h</sup> *Thompson v. Leach*, Comb. 468.

<sup>i</sup> Cru. Fines, 127, Rec. 185.

<sup>k</sup> Burt. Comp. 74, Sugd. Pow. 402.

<sup>l</sup> Co. Litt. 247.

<sup>m</sup> *Yates v. Bowen*, Str. 1104; Sugd.

Pow. 405.

<sup>n</sup> Britton, c. 28, fol. 66.

<sup>o</sup> Fol. 228. See also *Memorand. Scacch.* 22 Edw. 1, (prefixed to Maynard's Year-book, Edw. 2,) fol. 23.

<sup>p</sup> 5 Edw. 3, 70.

plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it?<sup>q</sup> Under Henry VI. this way of reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument;<sup>r</sup> upon a question, whether the heir was barred of his right of entry by the seoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as contrary to reason,<sup>t</sup> the maxim that a man shall not stultify himself seems to be now settled law;<sup>u</sup> although the doctrine does not appear to obtain in the ecclesiastical courts.<sup>v</sup> And when the deed is absolutely void it does not now appear to hold good, at common law. And clearly the next heir or other person interested may, after the death of the idiot or *non compos*, take advantage of his incapacity, and avoid the grant.<sup>w</sup> And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option.<sup>x</sup> In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him;<sup>y</sup> a deed by an infant being voidable, not void.<sup>z</sup> Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased.<sup>a</sup> For all these are under the protection of the law: which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to,

<sup>q</sup> 35 Assis. pl. 10.

<sup>r</sup> 39 Hen. 6, 42.

<sup>t</sup> F. N. B. 202.

<sup>u</sup> Litt. s. 405; Cro. Eliz. 398; 4 Rep. 128; Jenk. 40; 1 Fonbl. Eq. 48.

<sup>v</sup> *Turner v. Meyers*, 1 Hagg. 414.

<sup>w</sup> *Perkins*, s. 21.

<sup>x</sup> Co. Litt. 2.

<sup>y</sup> Co. Litt. 2.

<sup>z</sup> *Zouch v. Parsons*, 3 Burr. 1794. *Allen v. Allen*, 1 Connor & Lawson, 427. But an infant cannot in any case authorize any person by a letter of attorney to act in his name—such a deed would be void. 3 Burr. 1804. *Burt. Comp.* (201.)

<sup>a</sup> 2 Inst. 483; 5 Rep. 119.

when such imbecility ceases. By two recent acts<sup>b</sup> some important provisions are made respecting the leasing and renewing the leases of lunatics, infants, and other persons under disability, which we need not here mention in detail.

The case of a feme covert is somewhat different. She Feme covert. may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent.<sup>c</sup> And, [ 293 ] though he does nothing to avoid it, or even if he actually consents, the feme covert herself may, after the death of her husband, waive or disagree to the same; nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement.<sup>d</sup> But before the recent statute 3 & 4 W. IV. c. 74, the *conveyance* or other contract of a feme covert (except by some matter of record) was absolutely void at law, and not merely voidable;<sup>e</sup> and therefore could not be affirmed or made good by any subsequent agreement.

But by this act a very considerable alteration has been made in the law in this respect. Before the passing of the act a married woman had the power of conveying any estate or interest in lands to which she was entitled by fine or recovery; but these assurances have been abolished by this statute, (which will be more fully considered in the twenty-third chapter of the present volume,) and a married woman has been enabled since the 31st of December, 1833, in every case, (except that of being a tenant in tail, for which provision is made by the act,)<sup>f</sup> by deed to dispose of lands of any tenure, and also to release or surrender or extinguish any estate or power that she alone, or she and her husband in her right, may have in any lands of any tenure as fully and effectually as if she were a *feme sole*; but no such disposition, release, or surrender shall be valid unless the husband concur (3 and 4 W. IV. c. 74, s. 77). But every such deed must be produced and acknowledged before a judge of one of the superior courts at Westminster, or a

Her powers  
of alienation  
under 3 & 4  
W. IV. c. 74.

<sup>b</sup> 1 W. 4, c. 60; 1 W. 4, c. 65.

<sup>e</sup> Perkins, s. 154; 1 Sid. 120.

<sup>c</sup> Co. Litt. 3.

<sup>f</sup> See *post*, ch. 23.

<sup>d</sup> *Ibid.*

Master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be appointed under the act, (s. 79 ;) and such Judge, Master in Chancery, or Commissioners, before they shall receive such acknowledgment, shall examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she voluntarily consents to such deed, and unless she so consents, shall not permit her to acknowledge the same ; and in each case such deed, so far as it relates to the execution thereof by the married woman, shall be void (s. 80). When such acknowledgment shall be made, the Judge, Master in Chancery, or Commissioners, shall sign a memorandum to be endorsed on the deed, and a certificate of taking such acknowledgment (s. 84,) and the certificate, with an affidavit verifying the same, is to be lodged with the proper officer of the Court of Common Pleas, who shall cause the same to be filed of record in the court (s. 85), and on filing the certificate, the deed by relation is to take effect from the time of acknowledgment. (s. 86.) A married woman is to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal (s. 90). And it is further provided, that where the husband is a lunatic, or of unsound mind, the Court of Common Pleas may dispense with his concurrence, except where the Lord Chancellor, or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of the settlement in lieu of the husband (s. 91).

It will be seen, therefore, that since the time above mentioned a substitute has been provided for fines and recoveries, but as before that time these assurances were constantly employed in the alienation of the estates and interests of a married woman, it will still be necessary to understand their nature and effect ; and for these we must refer the reader to a subsequent chapter of this volume.

Property settled to the separate use of a married woman.

We have been hitherto speaking of the legal estates of a married woman ; but where property is settled to her separate use, without any restraint on alienation, it is now quite clear that to this extent she is in equity considered as a *feme sole*, and may convey or deal with it as such, and her conveyances and contracts will be supported in

equity;<sup>g</sup> and this rule existed before the recent statute, and is quite independent of it.

The case of an alien born is also peculiar. For he may <sup>Alien.</sup> purchase anything: but after purchase he can *hold* nothing except a lease for years of a house for convenience of merchandise, in case he be an alien-friend: all other purchases (when found by an inquest of office) being immediately forfeited to the King.<sup>h</sup> He may, however, acquire money to arise from the sale of land.<sup>i</sup> But an alien artificer cannot even take a lease for years.<sup>k</sup>

II. We are next, but principally, to inquire, *how* a man <sup>II. How a man may aliene.</sup> may aliene or convey: which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which, we have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon [ 294 ] one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession the municipal law has established *descents* and *alienations*: the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons, to whom the proprietor, by his own *voluntary* act, shall choose to relinquish it in his life-time. A translation, or transfer of property, being thus admitted by law, it became necessary that this transfer should be properly evidenced; in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was trans-

<sup>g</sup> Sug. Pow. 114, and authorities there cited.

<sup>h</sup> Co. Litt. 2. But see Harg. n. 7.

<sup>i</sup> *De Hourmelin v. Sheldon*, 1 Beav. 79, contra *Fourdrin v. Gowdey*, and

<sup>8</sup> Myl. & K. 385. And see *Rights of Persons* [372].

<sup>k</sup> 32 Hen. 8, c. 16, s. 13; *Lapierre v. M'Intosh*, 1 Per. & Dav. 629.

Common assurances, what they are.

ferred ; or with regard to the subject-matter, as what the thing transferred consisted of ; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom ; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

Are of four kinds.

These common assurances are of four kinds: 1. By matter *in pais*, or deed ; which is an assurance transacted between two or more private persons *in pais*, in the country ; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the King's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect, till after his death ; and that is by *devise*, contained in his last will and testament. We shall treat of each in its order.



## CHAPTER THE TWENTY-SECOND.

## OF ALIENATION BY DEED.

[ 295 ]

IN treating of deeds I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and, thirdly, how it may be avoided.

Division of the chapter.

1. First, then, a deed is a writing sealed and delivered by the parties.<sup>a</sup> It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, κατ' ἐξοχήν, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once solemnly and deliberately avowed.<sup>b</sup> If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other: which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syn-*

I. The general nature of deeds.

What a deed is.

Operates by way of estoppel.

Indenture, what it is.

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<sup>a</sup> Co. Litt. 171.

<sup>b</sup> Plowd. 434; *Bensley v. Burdon*, 2 Sim. & Stu. 519, and *ante*, p. 340.

Difference between original and counterparts, and between indentures and deeds poll.

*grapha* by the canonists:<sup>c</sup> and with us *chirographa*, or hand-writings:<sup>d</sup> the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom has been reserved in making out the indentures of a fine, when that assurance existed, whereof hereafter. But at length indenting only has come into use, without cutting through any letters at all; and this seems at present to serve for little other purpose, than to give name to the species of the deed, and is not now essential to its validity.<sup>e</sup> When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*, though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but polled or shaved quite even; and therefore called a deed-poll, or a single deed.<sup>f</sup>

II. The requisites of deeds.

1. Persons able to contract and be contracted with.

II. We are in the next place to consider the *requisites* of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject-matter to be contracted for; all which must be expressed by sufficient names.<sup>g</sup> So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

2. A good and sufficient consideration.

Secondly; the deed should be founded upon good and sufficient *consideration*. Not upon an usurious contract;<sup>h</sup> or an immoral or illegal consideration, nor upon fraud or collusion, either to deceive purchasers *bona fide*,<sup>i</sup> or just and lawful creditors,<sup>k</sup> any of which bad considerations will vacate the deed, except between the parties to it, and subject such persons as put the same in use, to forfeitures, and often to imprisonment. But a consideration

<sup>c</sup> Lyndew, l. 1, t. 10, c. 1.

<sup>d</sup> Mirror, c. 2, s. 27.

<sup>e</sup> A bill has been brought into Parliament several times to abolish (among other things) this useless form. It has been renewed in the present session, 1844.

<sup>f</sup> Mirror, c. 2, s. 27. Litt. a. 371, 372.

<sup>g</sup> Co. Litt. 35.

<sup>h</sup> Stat. 13 Eliz. c. 8.

<sup>i</sup> Stat. 27 Eliz. c. 4; 9 East, 59.

<sup>k</sup> Stat. 13 Eliz. c. 5.

is not essential to the actual validity of any other deed than a bargain and sale, although a Court of Equity will not lend its assistance to carry a deed into effect, unless it be supported by some consideration.<sup>1</sup> The consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant;<sup>m</sup> and is therefore founded in motives of justice. Deeds made without any consideration, or upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bona fide* purchasers, under the statute already referred to. [ 297 ]

The consideration either good or valuable.

Thirdly, the deed must be *written*, or, I presume, *printed*, for it may be in any character or any language; but it must be upon paper or parchment. For, if it be written on stone, board, linen, leather or the like, it is no deed.<sup>n</sup> Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself more perfectly than any other way, both these desirable qualities: for there is nothing else so durable, and, at the same time, so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps, imposed on it by the several statutes for the increase of the public revenue;<sup>o</sup> else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II., c. 3, enacts, that no lease, estate or interest, in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value,) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender

3. The deed must be written or printed.

Statute of Frauds, 29 Car. II. c.3.

<sup>1</sup> *Osgood v. Strode*, 2 P. Wms. 245, 6 ed.

<sup>m</sup> 8 Rep. 83.

<sup>n</sup> Co. Litt. 229; F. N. B. 122.

<sup>o</sup> See Rights of Persons [324].

of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorised in writing.

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4. Must be legally and orderly set forth.

Fourthly; the matter written must be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to determine.<sup>p</sup> For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual<sup>q</sup> order.

The formal parts are—  
1. The premises.

1. The *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.<sup>r</sup>

2, 3. The habendum and tenendum.

2, 3. Next come the *habendum* and *tenendum*.<sup>s</sup> The office of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the estate granted in the premises. As if a grant be to "A. and the heirs of his body," in the premises, *habendum* "to him and his heirs for ever," or *vice versa*; here A. has an estate-tail, and a fee-simple expectant thereon.<sup>t</sup> But, had it been in the premises "to him and his

<sup>p</sup> Co. Litt. 225.

<sup>q</sup> *Ibid.* 6.

<sup>r</sup> See Appendix, No. I. p. i. No. II. p. v.

<sup>s</sup> See Appendix, No. I. p. i. and II. p. vi.

<sup>t</sup> Co. Litt. 21; 2 Roll. Rep. 19, 23; Cro. Jac. 476.

heirs," *habendum* "to him for life," the *habendum* would be utterly void;<sup>2</sup> for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away, or divested by it. The *tenendum* "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the [ 299 ] tenure by which the estate granted was to be holden; viz.: "*tenendum per servitium militare, in burgagio, in libero, socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Edw. I., it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi*;<sup>3</sup> but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

4. Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As "rendering therefore yearly the sum of ten shillings, or a pepper-corn, or two days' ploughing, or the like."<sup>4</sup> Under the pure feudal system, this render, *reditus*, return, or rent, consisted in chivalry principally of military services; in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit.<sup>5</sup> To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed.<sup>6</sup> But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee.

5. Another of the terms upon which a grant may be

<sup>2</sup> 2 Rep. 23; 8 Rep. 56.

<sup>3</sup> Madox, *Formul. passim*.

<sup>4</sup> Append. No. II. s. 1, p. iv.

<sup>5</sup> See *ante*, p. 42.

<sup>6</sup> Plowd. 13; 8 Rep. 71.

[ 300 ] made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated; as "provided always, that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like.<sup>a</sup>

Blackstone<sup>b</sup> and others have, however, seemed to mention the *reddendum* and conditions, as usual in all deeds; but this is not so, as they are only applicable to particular deeds and to peculiar circumstances. Thus the *reddendum* is scarcely ever employed but in leases, and conditions in leases, mortgage deeds, and settlements, and it is with this qualification, that what is said of these parts of a deed should be read.

Warranty.

6. Next followed the clause of *warranty*; whereby the grantor did, for himself and his heirs, warrant and secure to the grantee the estate so granted. By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch, or call, the lord or donor, to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense.<sup>c</sup> And so, by our ancient law, if before the statute of *quia emptores*, a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered.<sup>d</sup> Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage (which was called *homage aunces-trel*) this also bound the lord to warranty;<sup>e</sup> the homage being an evidence of such a feudal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty,<sup>f</sup> because they enjoy the equivalent. And so, even more recently, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is

<sup>a</sup> Append. No. III. p. ix.

<sup>b</sup> 4 Cru. Dig. 26, 8d edit.

<sup>c</sup> Feud. l. 2, t. 8, & 25.

<sup>d</sup> Co. Litt. 384.

<sup>e</sup> Litt. s. 148.

<sup>f</sup> Co. Litt. 174.

payable) were bound to warrant the title.<sup>h</sup> But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs;<sup>i</sup> because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied;<sup>k</sup> they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant*.<sup>l</sup> [ 301 ]

These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompense in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood;<sup>m</sup> and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right of fee-simple to one who was already in possession, and super-added a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was where the heir derived, or might by possibility have derived, his title to

Express warranties.

Warranty, lineal or collateral,

<sup>h</sup> Co. Litt. 384.

<sup>i</sup> Litt. s. 783.

<sup>j</sup> *Ibid.*

<sup>m</sup> Co. Litt. 373.

<sup>k</sup> *Ibid.* 102.

the land warranted, either from or through the ancestor who made the warranty: as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son.<sup>a</sup> *Collateral warranty* was where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with [ 302 ] warranty, this was collateral to the elder brother.<sup>o</sup> But where the very conveyance, to which the warranty was annexed, immediately followed a disseisin, or operated itself as such (as, where a father tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty) this, being in its original manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty *commencing by disseisin*; and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor.<sup>p</sup>

or commencing by disseisin.

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor.<sup>q</sup> But though, without assets, he was not bound to insure the title of *another*, yet, in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself*; for, if he could succeed in such claim, he would then gain assets by descent, (if he had them not before,) and must fulfil the warranty of his ancestor: and the same rule<sup>r</sup> was with less justice adopted also in respect of collateral warranties which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to aliene their lands with warranty; which collateral warranty of the father descending upon his son

<sup>a</sup> Litt. s. 703, 706, 707.

<sup>o</sup> *Ibid.* s. 705, 707.

<sup>p</sup> *Ibid.* s. 698, 702.

<sup>q</sup> Co. Litt. 102.

<sup>r</sup> Litt. s. 711, 112.



(who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the statute of Gloucester, 6 Edw. I. c. 3, declared, that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in 50 Edw. III. to make the same provision universal, by enacting that no collateral warranty should be a bar, unless where assets descended from the same ancestor;\* but it then proceeded [ 303 ] not to effect. However, by the statute 11 Hen. VII., c. 20, notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann., c. 16, all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir. By the wording of which last statute it should seem, that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar:† which was therefore formerly mentioned" as one of the ways whereby an estate tail might be destroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *de donis*; as that act was principally intended to prevent the tenant in tail from disinheriting his own issue: and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate tail and all remainders and reversions expectant thereon.‡ And so it still continued until very recently, to be, notwithstanding the statute of queen Anne, if made by tenant in tail in possession: who therefore might, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by super-

\* Co. Litt. 373.

† Page 134.

‡ Litt., s. 712; 2 Inst. 293.

\* Co. Litt. 374; 2 Inst. 535.

adding a warranty to his grant; which, if accompanied with assets, barred his own issue, and without them barred such of his heirs as might be in remainder or reversion. But warranty has long been out of use, and by the 3 & 4 W. IV. c. 74, s. 14, all warranties made after the 31st of December, 1833, by any tenant in tail shall be absolutely void against the issue in tail and all persons whose estates are to take effect after the determination of the estate tail; and the Real Property Commissioners have recommended the entire abolition of the doctrine of warranty.\*

[ 304 ] 7. After warranty, when it was used, usually followed  
 7. *Covenants*-*covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like;† the grantee may covenant to pay his rent, or keep the premises in repair, &c. Covenants which are intimately attached to the thing granted, as to repair, pay rent, &c., are said to run with the land, and bind not only the lessee but his assignee also, and enure to the heir of the lessor even though not named in the covenant, as do also those which the grantor makes, that he is seised in fee, has a right to convey, &c., which inure not only to the grantee, but also to his assignee and to his heirs.‡ If the covenantor covenants for himself and his *heirs*, it descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself, or himself and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant had in

\* See Third Real Prop. Rep.

† See Appendix, No. I. p. ii. iii.;  
 No. II. p. vi. vii.

‡ *Lougher v. Williams*, 2 Lev. 92;  
*Gill v. Vermuden*, 2 Freem. 199;  
*Spencer's case*, 5 Co. 17; Dougl. 445.

modern practice (long before the recent statute) totally superseded the other.

8. Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly or by reference to some day and year before-mentioned.<sup>a</sup> Not but a deed is good, although it mention no date: or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is, delivered, can be proved.<sup>a</sup> 8. The conclusion.

I proceed now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary, wherever any of the parties desire it;<sup>b</sup> and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is mis-recited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.<sup>c</sup> 5th. Reading. [ 305 ]

Sixthly, it is requisite that the party, whose deed it is should *seal*, and now, in most cases, I apprehend, should *sign* it also. 6th. Sealing and signing.

The use of seals as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history.<sup>d</sup> And in the book of Jeremiah, there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase.<sup>e</sup> In the civil law also<sup>f</sup> seals were the evidence of truth, and were required on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon

<sup>a</sup> Appendix, No. I. p. iii.

<sup>a</sup> Co. Litt. 46; Dyer, 28.

<sup>b</sup> See *Rex v. Longman*, 1 Nev. & M. 576.

<sup>c</sup> 2 Rep. 3, 9; 11 Rep. 27.

<sup>d</sup> 1 Kings, c. 21. Daniel, c. 6. Esther, c. 8.

<sup>e</sup> "And I bought the field of Hamameel, and weighed him the money,

even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." c. 32.

<sup>f</sup> Inst. 2, 10, 2 & 8.

ancestors, they were not much in use in England. For though Sir Edward Coke<sup>a</sup> relies on an instance of King Edwyn's making use of a seal about an hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance of being sealed; since we are assured, by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And, indeed, this inability to write, and therefore making a cross in its stead, is honestly avowed by Cædwalla, a Saxon king, at the end of one of his charters.<sup>b</sup> In like manner, and for the same insurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names, which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, [and is generally thought to be the oldest sealed charter of any authenticity in England.<sup>i</sup> At the Conquest, the Norman lords brought over into this kingdom their own fashions, and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross.<sup>k</sup> The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not intro-

<sup>a</sup> 1 Inst. 7.

<sup>b</sup> "*Propria manu pro ignorantia literarum signum sanctae crucis expressi et subscripsi.*" Seld. Jan. Angl. l. 1, s. 42. And this (according to Procopius) the Emperor Justin in the east, and Theodoric, King of the Goths, in Italy, had before authorized by their example, on account of their inability

to write.

<sup>i</sup> Lamb. Archeion. 51.

<sup>k</sup> *Normani chirographorum confectionem cum crucibus aureis aliisque signaculis sacris, in anglia firmari solitam in caeram impressam mutant, modumque scribendi anglicum rejiciunt.*" Ingulph.

duced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the Holy Land, where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

*ab. 1193.*

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds, "*sealed and delivered*," continues to this day; notwithstanding the statute 29 Car. II. c. 3, before mentioned, revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other.<sup>1</sup> And the more modern opinion, perhaps, is that the statute of frauds is applicable only to mere agreements, and that signing is not essential to the validity of a deed.<sup>m</sup> [ 306 ]

A seventh requisite to a good deed is that it be *delivered* by the party himself or his certain attorney: which therefore is also expressed in the attestation; "*sealed and delivered*." A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing,<sup>n</sup> and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee; in which last case it is not delivered as a *deed*, but as an *escrow*; that is, as a scrawl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes,<sup>o</sup> and no express words that it

*7th. Delivery.*

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*Escrows, what they are.*

<sup>1</sup> 3 Lev. 1; Stra. 764.

<sup>m</sup> 3 Prest. Aba. 61; 1 Prest. Aba. 154, Sug. Pow. 242, 4th ed., and 1 Vend. & P. p. 132, 10th ed. And see

*Crook v. Goodman*, 2 Gale & D. 163.

<sup>n</sup> Perk. s. 130.

<sup>o</sup> Co. Litt. 36.

is delivered upon an escrow are necessary, but that conclusion may be drawn from all the circumstances.<sup>p</sup>

8th. Attestation.

The *last* requisite to the validity of a deed is the *attestation*, or execution of it in the *presence of witnesses*: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers;<sup>q</sup> which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power) but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus: "*hijis testibus Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis.*"<sup>r</sup> This, like all other solemn transactions, was originally done only *coram paribus*,<sup>s</sup> and frequently when assembled in the court baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.*<sup>t</sup> Afterwards the attestation of other witnesses was allowed, the trial [ 308 ] in case of a dispute being still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict:<sup>u</sup> till that also was abrogated by the Statute of York, 12 Edw. II. st. 1, c. 2. And in this manner, with some such clause of *hijis testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner.<sup>v</sup> But in the king's common charters, writs, or letters patent, the style is now altered; for at present the king is his own witness, and attests his letters patent thus: "*teste meipse*, witness ourselves at Westminster, &c." a form which was intro-

<sup>p</sup> *Johnson v. Baker*, 4 B. & A. 440;

*Murray v. Earl of Stair*, 2 B. & C.

82, overruling *Shep. Touch.* 58.

<sup>q</sup> *Feud.* l. 1, t. 4.

<sup>r</sup> *Co. Litt.* 7.

<sup>s</sup> *Feud.* l. 2, t. 32.

<sup>t</sup> *Spelm. Gloss.* 228; *Madox. Formul.* No. 221, 322, 660.

<sup>u</sup> *Co. Litt.* 6.

<sup>v</sup> 2 *Inst.* 77.

duced by Richard the First,<sup>x</sup> but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijis testibus* entirely discontinued till the reign of Henry the Eighth;<sup>y</sup> which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestation, either at the bottom or on the back of the deed.<sup>z</sup>

III. We are next to consider how a deed may be *avoided*,<sup>III. How a deed may be avoided.</sup> or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before mentioned; either, 1. Proper parties, and a proper subject-matter: 2. A good and sufficient consideration: 3. Writing, on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and by the statute, in most cases signing also: or, 7. Delivery; it is a void deed, to the extent before mentioned. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation.<sup>a</sup> 2. By intentionally breaking off, or defacing the seal;<sup>b</sup> but if the seal is broken off by the party bound, this will not avoid the deed so far as he is concerned; and no estate will in any case be devested if it has once passed by the deed.<sup>c</sup> [ 309 ] 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was anciently the province of the court of Star-chamber, and now

<sup>x</sup> Madox. *Formul.* No. 515.

<sup>y</sup> *Ibid.* Dissert. fol. 32.

<sup>z</sup> 2 Inst. 78.

<sup>a</sup> 11 Rep. 27.

<sup>b</sup> 5 Rep. 23; Touch. c. 4, s. 6; Palmer, 408.

<sup>c</sup> *Bolton v. Bishop of Carlisle*, 2 H. B. 263.

of the Chancery, and the courts of common law also on a plea of *non est factum*, when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery.<sup>f</sup> In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

II. The several species of deeds. Deeds divided into those which operate at common law, and by virtue of the Stat. of Uses.

Having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of *real estates*: for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed: that is, a writing sealed and delivered. The former, being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated *conveyances*; which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

1. Those at common law are either original or derivative.

I. Of conveyances by the common law, some may be called *original*, or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises: others are *derivative*, or *secondary*; whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

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Original are,

Original conveyances are the following:—1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: *derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance.

1. Feoffment.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi*.<sup>g</sup> It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined the conveyance of any corporeal hereditaments from one person to another, by delivery of the possession of the hereditaments conveyed,<sup>h</sup> and evidenced by an instrument in

<sup>f</sup> Toth. numo. 24; 1 Vern. 348.  
See Private Wrongs, [448].

<sup>g</sup> Co. Litt. 9. See Appendix, No. I.

<sup>h</sup> 2 Sand. Us. 1.



writing, for since the statute of Frauds, 29 Car. 2. c. 3, no valid feoffment can be made without a written instrument. He that so gives, or enfeoffs, is called the *feoffor*; and the person so enfeoffed is denominated the *feoffee*.

This is plainly derived from, or is indeed itself the very mode of the ancient feudal donation; for though it may be performed by the word "*enfeoff*," or "*grant*," yet the aptest word of feoffment is, "*do* or *dedi*."<sup>1</sup> And it is still directed and governed by the same feudal rules; in-  
somuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*."<sup>2</sup> And therefore as in pure feudal donations, the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer: "*ne quis plus donasse præsumatur, quam in donatione expresserit*;" so if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life.<sup>1</sup> For, as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person and subsist only for his life; unless the feoffor, by express provision in [ 311 ] the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple, by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate or freehold.<sup>m</sup>

But by the mere words of the deed the feoffment is by no means perfected: there remains a very material ceremony to be performed, called *livery of seisin*, without which the feoffee has but a mere estate at will.<sup>n</sup> This livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession of the land or

Livery of  
seisin.

What it is.

<sup>1</sup> Co. Litt. 9.

<sup>2</sup> Wright, 21.

<sup>1</sup> Co. Litt. 42.

<sup>m</sup> Co. Litt. 9.

<sup>n</sup> Litt. s. 66.

tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit*:"<sup>o</sup> and an estate was then only perfect, when, as the author of *Fleta* expresses it in our law, *fit juris et seisinæ conjunctio*."<sup>p</sup>

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord*; and that he did not grant a bare litigious right which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate: and that such, as claimed title by other means, might know against whom to bring their actions.

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In all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law *plenum dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession*; which possession could not be acquired without both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them, in the name of the whole.<sup>q</sup> And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists,<sup>r</sup> acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no

In ecclesiastical promotions, corporal possession is now requisite.

<sup>o</sup> Wright, 87.

<sup>p</sup> L. 3, c. 15, s. 5.

<sup>q</sup> *Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possi-*

*dere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.* (Ff. 41, 2, 3.) And again: *traditionibus dominia rerum non nudis pactis, transferuntur.* (Cod. 2, 3, 20.)

<sup>r</sup> *Decretal.* l. 3, t. 4, c. 40.

temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which were cast on the heir by the act of the law itself, the heir had not *plenum dominium*, or full and complete ownership, till he had made an actual corporal entry into the lands: for if he died before entry made, his heir was not entitled to take the possession, but the heir of the person who was last actually seised.<sup>a</sup> It was not therefore only a mere right to enter, but the actual entry, that made a man complete owner; so as to transmit the inheritance to his own heirs; *non jus, sed seisinam, facit stipitem*.<sup>b</sup> But this rule, as we have already seen, has been recently altered.<sup>c</sup>

Yet the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth:<sup>d</sup> "Now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel." Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses, who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses.<sup>e</sup> With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands.<sup>f</sup> And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by

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<sup>a</sup> See pp. 247, 267.<sup>b</sup> Flet. l. 6, c. 2, s. 2.<sup>c</sup> See *ante*, p. 247.<sup>d</sup> Ch. 4, v. 7.<sup>e</sup> Steirnhook. *de jure Sueon.* l. 2,

c. 4.

<sup>f</sup> Hicks *Dissert. Epistolary*. 85.

Yard-to-nants.

re-delivery of the same, in the presence of a jury of tenants, and these tenants are hence called yard tenants.

Advantages  
of convey-  
ances in  
writing.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and incumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere, simple, corporal, transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion.

*Written deeds introduced*

[ 314 ]

Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporal possession.

Livery of sei-  
sin, when it  
must be  
made.

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses: and in leases for years, or other chattel interests, it is not necessary. In leases for years operating under the common law, an actual *entry* is necessary, to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*; and, when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years.\* This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done: which it would have been im-

Interesse  
termini.

\* Co. Litt. 46.

proper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot at the common law be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seisin: which livery, being an actual manual tradition of the land, must take effect *in præsenti*, or not at all.<sup>a</sup>

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen that at the common law livery must be made to the particular tenant.<sup>b</sup> But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*;"<sup>c</sup> but it must be made to the remainder-man himself, by consent of the lessee for [ 315 ] years; for without his consent no livery of the possession can be given;<sup>d</sup> partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons depending on the doctrine of attornments, now abolished.<sup>e</sup>

Livery of seisin is either in *deed* or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themselves in person, if the attorney be authorised by deed for the purpose)<sup>f</sup> come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all persons<sup>g</sup> having any lawful estate or possession therein, as lessees or such like, being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring, or latch of the door, (no person hav-

Livery of seisin is either in deed or in law.

Livery in deed.

<sup>a</sup> See page 198.

<sup>b</sup> Page 201.

<sup>c</sup> Co. Litt. 49.

<sup>d</sup> *Ibid.* 48.

<sup>e</sup> See *ante*, p. 339.

<sup>f</sup> 2 Roll. Ab. 8; R. pl. 4; Co. Litt. 52 b.

<sup>g</sup> *Doe v. Taylor*, 5 B. & Ad. 575.

ing any lawful estate or interest therein being within,) and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others.<sup>a</sup> If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all;<sup>i</sup> but if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law,<sup>k</sup> *pares debent interesse investituræ feudi, et non alii*: for which this reason is expressly given; because [ 316 ] the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations,) was still reserved to the *pares* or jury of the county.<sup>l</sup> Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case, but by the consent of the particular tenant; and the consent of one will not bind the rest.<sup>m</sup> And in all these cases it is prudent, and usual, to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses. But this is not absolutely necessary, as after twenty years' possession, livery of seisin will be presumed to have been made, although not endorsed.<sup>n</sup> And thus much for livery in deed.

Indorsement  
of livery,

<sup>a</sup> Co. Litt. 48; West Symb. 251.

<sup>i</sup> Litt. s. 414.

<sup>k</sup> Feud. l. 2, t. 58.

<sup>l</sup> Gilb. 10, 35.

<sup>m</sup> Dyer, 18.

<sup>n</sup> *Jackson v. Jackson*, Sel. Cha. Ca. 81; Fitzgib. 146; *Dos d. Wilkins v. Marquis of Cleveland*, 6 B. & C. 864.

Livery in law is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; for until recently, if he dare not enter, through fear of his life or bodily harm, then what was called his *continual claim*, made yearly, in due form of law, as near as possible to the lands,<sup>o</sup> sufficed without an entry;<sup>p</sup> but now no right of entry is to be preserved by continual claim.<sup>q</sup> This livery in law cannot however be given or received by attorney, but only by the parties themselves.<sup>r</sup>

Livery in law.

A feoffment has of late been generally resorted to in practice rather for its peculiar powers and effects than as a simple mode of assurance from one person to another. Thus a feoffment by a particular tenant, destroys the contingent remainders depending on the particular estate,<sup>s</sup> and if made by a tenant in tail in possession, discontinues the estate tail;<sup>t</sup> and until lately it seemed quite settled that a feoffment might be employed to convey a fee to the feoffee by disseisin, whatever might have been the estate of the feoffor, provided he had possession of the lands enfeoffed.<sup>u</sup> But this doctrine must now be considered to be greatly shaken, and a feoffment cannot be said to have any longer this effect.<sup>v</sup>

Where a feoffment is used in practice.

Doctrine of disseisin altered.

2. The conveyance by gift, *donatio*, is properly applied to the creation of an estate tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it; for the operative words of conveyance in this case are *do* or *dedi*:<sup>x</sup> and gifts in

Gifts.

<sup>o</sup> Litt. s. 421, &c.

<sup>p</sup> Co. Litt. 48.

<sup>q</sup> 3 & 4 W. 4, c. 27, s. 4, and Private Wrongs [175].

<sup>r</sup> Co. Litt. 52.

<sup>s</sup> *Archer's case*, 1 Co. 66 b.; *Hasler v. Sutton*, 6 Bing. 500; 2 Sim. & Stu. 513, S. C.

<sup>t</sup> Co. Litt. 327 b.; *Doe d. Jones v. Jones*, 1 B. & C. 233. See *ante*, p. 320.

<sup>u</sup> See the authorities referred to in Butl. Co. Litt. 330 b, n. (f); 2 Sand. Us. & Tr. 15; 2 Prest. Abs. 293.

<sup>v</sup> *Doe d. Maddock v. Lynes*, 3 B. & C. 388; *Doe d. Dormer v. Moody*, 2 Prest. Conv. Pref. 32; 1 Sand. Us. 40; *Jerritt v. Weare*, 3 Pri. 575; and see *Reynolds v. Jones*, 2 Sim. & Stu. 206.

<sup>x</sup> West. Symbol. 256.

[ 317 ] tail are equally imperfect without livery of seisin, as feoffments in fee-simple.<sup>7</sup> And this is the only distinction that Littleton seems to take, when he says,<sup>a</sup> "it is to be understood that there is a feoffor and feoffee, donor and donee, lessor and lessee;" viz. feoffor is applied to a feoffment in fee-simple; donor to a gift in tail; and lessor to a lease for life or for years, or at will. But this kind of gift is entirely out of use, and in common acceptance gifts are frequently confounded with the next species of deeds; which are,

## 3. Grants.

3. Grants, *concessionēs*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things, whereof no livery can be had.<sup>a</sup> For which reason all corporeal hereditaments, as land and houses, are said to lie in *livery*; and the others, as advowsons, commons, rents, reversions, &c., to lie in *grant*.<sup>b</sup> And the reason is given by Bracton:<sup>c</sup> "*traditio*, or livery, *nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quæ sunt ipsum jus rei vel corpori inhærens, traditionem non patiuntur.*" These therefore pass merely by the delivery of the deed. And in signiories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject matter: for the operative words therein commonly used are *dedi et concessi*, "have given and granted."

## 4. Lease.

4. A Lease is properly a conveyance of any lands or tenements, (usually in consideration of rent or other annual recompense,) made for life, for years, or at will, but always for a *less* time than the lessor hath in the premises; for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let: *demisi, concessi, et ad firmam tradidi.*" *Farm*, or *feorme*, is an old

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<sup>7</sup> Litt. s. 59.<sup>a</sup> Sec. 57.<sup>b</sup> Co. Litt. 9.<sup>b</sup> Co. Litt. 172.<sup>c</sup> Bract. l. 2, c. 18.



Saxon word, signifying provisions:<sup>d</sup> and it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, viz. leases for life of corporeal hereditaments; but to no other.

Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee simple might let leases of any duration: for he hath the whole interest: but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband, seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee simple, such as parsons and vicars, with consent of the patron and ordinary.<sup>e</sup> So also bishops, and deans, and such other ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by [ 319 ]

For what terms leases may be made and by whom.

<sup>d</sup> 8pelm. Gl. 229.

<sup>e</sup> Co. Litt. 44.

The restraining and enabling statutes as to leases.

The enabling stat. 32 Hen. VIII. c. 38.

several statutes, this power, where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statutes. We will take a view of them all, in order of time.

And, first, the *enabling* statute, 32 Hen. VIII. c. 18, empowers three manner of persons to make leases, to endure for three lives or one-and-twenty years, which could not do so before. As first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee simple or fee tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding.<sup>s</sup> 1. The leases must be by indenture; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, or three lives; and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must have been of corporeal hereditaments, and not of such things as lay merely in grant; for no rent could be reserved thereout by the common law, as the lessor could not resort to them to distrain. But now by the statute 5 Geo. III. c. 17, a lease of tithes or other incorporeal hereditaments alone, may be granted by any bishop or any such ecclesiastical or eleemosynary corporation, for one, two, or three lives, or terms not exceeding twenty-one years, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law. 7. It must be of lands and tenements

<sup>s</sup> Co. Litt. 44.

most commonly letten for twenty years past; so that if [ 320 ] they had been let for above half the time (or eleven years out of twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers, and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Next follows, in order of time, the *disabling* or *re-* Disabling  
stat. 1 Eliz.  
c. 19. *straining* statute, 1 Eliz. c. 19, (made entirely for the benefit of the successor,) which enacts, that all grants by archbishops and bishops (which include even these confirmed by the dean and chapter; the which, however long or unreasonable, were good at common law) other than for the term of one-and-twenty years or three lives from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act.<sup>h</sup> But, by a saving expressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which<sup>i</sup> for the future the statute 1 Jac. I. c. 3, extends the prohibition to grants Disabling  
stat. 1 Jac.  
1, c. 3. and leases made to the king, as well as to any of his subjects.

Next comes the statute 13 Eliz. c. 10, explained and 13 Eliz. c. 10. enforced by the statutes 14 Eliz. c. 11 & 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, which extend the restrictions laid by the last mentioned statute on bishops, to certain other in- [ 321 ] ferior corporations, both sole and aggregate. From laying

<sup>h</sup> Co. Litt. 45.<sup>i</sup> 11 Rep. 71.

all which together we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1. They must not exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, must be yearly reserved thereon, and the premises demised must have been commonly letten.<sup>k</sup> 3. Houses in corporations, or market towns, may be let for forty years; provided they be not the *mansion-houses* of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair: and they may also be aliened in fee-simple for lands of equal value in recompense; but by the 57 G. III. c. 99, s. 32, all contracts for the letting of the house of residence on any benefice, or the buildings, garden, &c., to which any spiritual person shall be ordained by his bishop to proceed and reside in, shall be void. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease (by the equity of the statute) shall be made without impeachment of waste.<sup>l</sup> 6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void.

Observations  
on the sta-  
tutes.

Concerning these restrictive statutes there are two observations to be made. First, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson, or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent.<sup>m</sup> Secondly, that though leases, contrary to these acts, are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was

<sup>k</sup> Co. Litt. 45 a; *Doe v. Yarrow*, 1 Bing. 24.

<sup>l</sup> Co. Litt. 45.

<sup>m</sup> *Ibid.* 44.

intended for the benefit of the successor only; and no man shall make an advantage of his own wrong.<sup>a</sup>

There is yet another restriction with regard to college leases, by statute 18 Eliz. ch. 6, which directs, that one-third of the old rent, then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d., or a quarter of malt for every 5s.; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market-day before the rent becomes due. This is said<sup>o</sup> to have been an invention of Lord Treasurer Burleigh, and Sir Thomas Smith, then principal Secretary of State: who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies (which effects were likely to increase to a greater degree) devised this method for upholding the revenues of colleges. Their foresight and penetration has, in this respect, been very apparent: for, though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted; and the money arising from corn rents is *communibus annis*, almost double to the rents reserved in money.

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In college leases one-third of the rent to be in wheat or malt.

The leases of beneficed clergymen were farther restrained in case of their non-residence, by the 13 Eliz. c. 20; 14 Eliz. c. 11; 18 Eliz. c. 11; and 43 Eliz. c. 9. But these statutes were repealed by the 43 G. III. c. 84, and the 57 G. III. c. 99.

Statutes relating to the non-residence of clergymen.

By the statute 6 W. IV. c. 20, certain provisions are made with respect to the renewal of leases granted by ecclesiastical persons; and it is provided that from the 1st of March, 1836, no ecclesiastical person shall grant any new lease of any land or tithes, parcel of his ecclesiastical possessions, by way of renewal of any lease granted for two or more lives, until one of the persons for whose life such lease was made shall die, and then only for the surviving lives or life and such new life or lives, as with the life or lives of the survivor or survivors shall make up the number of lives, not exceeding three, for which such lease shall

6 W. IV. c. 20, as to the renewal of ecclesiastical leases.

<sup>a</sup> Co. Litt. 45.

<sup>o</sup> Strype's Annals of Eliz.

have been made; and where any lease shall have been granted for forty years, no ecclesiastical person shall grant any new lease by way of renewal until fourteen years of such lease shall have expired, or where for thirty years, until ten years shall have expired; or where for twenty-one years, until seven years have expired; and when any such lease shall have been granted for years, it shall not be renewed for life or lives (ss. 1 & 9). By s. 2, it is provided, wherever any ecclesiastical person shall grant any renewed lease, it shall contain a recital, if a lease for lives, of the names of the *cestuis que vie*, and stating which are dead, &c.; and if a lease for years, for what term of years the last preceding lease was granted; and every such recital is to be deemed evidence of the truth of the matter recited; and a penalty is imposed on persons introducing recitals into such leases, knowing them to be false (s. 3). But it is not to be supposed that such recitals or statements are necessary for the validity of the lease: it being expressly enacted by a subsequent act of the same session,<sup>p</sup> that leases granted under the provisions of the 6 & 7 W. IV. c. 20, are not void by reason of not containing such recitals as are mentioned in that act. But where a practice has existed for ten years past, to renew such leases for forty, thirty, or twenty-one years, at shorter periods than fourteen, ten, or seven years, the lease may be renewed conformably to such practice, provided that such practice shall be proved to the satisfaction of the archbishop or bishop (s. 4). Neither is this act to prevent ecclesiastical persons exchanging any life or lives in their leases with the approbation of the king, archbishop, or bishop, as the case may be (s. 5). Nor is the act to prevent grants under acts of Parliament (s. 6); nor leases for the same term as preceding leases (s. 7); nor is it to render illegal leases valid (s. 8). It does not extend to Ireland (s. 10). By stat. 5 Vict. 27, incumbents of ecclesiastical benefices are allowed to demise the lands belonging to their benefices on farming leases; and by stat. 5 & 6 Vict. c. 108, ecclesiastical corporations, both aggregate and sole, are allowed to grant leases for long terms of years for building, and other purposes of

5 Vict. c. 27,  
farming  
leases.

5 & 6 Vict. c.  
108, building  
leases.

<sup>p</sup> 6 & 7 W. 4, c. 61.

improvement. The provisions of these acts are far too numerous to be stated in this elementary treatise.

5. An *exchange* is a mutual grant of equal interests, <sup>5. An exchange.</sup> the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution.<sup>a</sup> The estates exchanged must be equal in quantity;<sup>b</sup> not of *value*, for that is immaterial, but of *interest*; as fee-simple for fee-simple, and the like. But one estate for years is in the eye of the law not larger than another. And the exchange may be of things that lie either in grant or in livery.<sup>c</sup> But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance:<sup>d</sup> for each party stands in the place of the other and occupies his right, and each of them hath already had corporal possession of his own land. Entry, where the assurance operates by the common law, must be made on both sides; for, if either party die before entry, the exchange is void for want of sufficient notoriety.<sup>e</sup> And so also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own.<sup>f</sup> However, where the exchange is made by lease and release, or other conveyance operating under the statute of uses, an entry is unnecessary, as the party is in possession by force of the statute.<sup>g</sup> If, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title, he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges. But although this warranty and right of re-entry are incident to an exchange at common law, it has been considered doubtful by some

<sup>a</sup> Co. Litt. 50, 51.

<sup>b</sup> Litt. s. 64, 65.

<sup>c</sup> Co. Litt. 51.

<sup>d</sup> Litt. s. 62.

<sup>e</sup> Co. Litt. 50.

<sup>f</sup> Perk. s. 288. See the 55 Geo. 3, c. 147, which authorizes an exchange between a rector and his parishioners.

<sup>g</sup> 4 Cru. Dig. 140.

whether they are incident to an exchange effected by mutual conveyances under the statute of uses. Mr. Cruise appears to think that they are so incident.\* But where mutual conveyances are used, the one in consideration of the other, the incidents of an exchange may be avoided and the objects retained, but in such cases the word "exchange" need not and should not be used.

## 6. Partition.

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6. A partition is, when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. Here, as in some instances, there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law, coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in the cases of tenants in common and coparceners the conveyance must have been perfected by livery of seisin;<sup>y</sup> although in the case of joint-tenants, livery of seisin was unnecessary.<sup>z</sup> And the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, made no alteration in these points. But the statute of frauds, 29 Car. II. c. 3, hath now abolished this distinction, and made a deed or writing in all cases necessary.

The derivative conveyances are,

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary*, or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance: as,

## 7. Releases.

7. Releases; which are a discharge of conveyance of a man's right in lands or tenements, to another that hath some vested estate in the lands.<sup>a</sup> The words generally used therein are "remised, released, and for ever quit-claimed:"<sup>b</sup> and these releases may enure either, 1. By

\* 1 Cru. Dig. 140; and see Mr. Parken's note on exchanges, 4 Byth. 138; to which, for further information as to exchanges, the reader is referred.

<sup>y</sup> Litt. s. 250; Co. Litt. 169.

<sup>z</sup> Co. Litt. 200 b.

<sup>a</sup> 2 Prest. Conv. 214.

<sup>b</sup> Litt. s. 445.



way of *enlarging an estate*, or *enlarger l'estate*: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee.<sup>c</sup> But in this case the releasee must have a vested estate, giving a present or future right of enjoyment for the release to work upon; for if there be a lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releasee.<sup>d</sup> 2. By way of *passing an estate*, or *mitter l'estate*: as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole.<sup>e</sup> And in both these [ 325 ] cases there must be a privity of estate between the releasor and the releasee:<sup>f</sup> that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit*: as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful.<sup>g</sup> 4. By way of *extinguishment*: as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.: this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate.<sup>h</sup> 5. By way of *entry and feoffment*: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion: which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee.<sup>i</sup> And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere

1. Enure by way of enlarging the estate.

2. Passing an estate.

3. Passing a right.

4. Extinguishment.

5. Entry & feoffment.

<sup>c</sup> Litt. s. 465.

<sup>d</sup> *Ibid.* s. 459.

<sup>e</sup> Co. Litt. 273.

<sup>f</sup> *Ibid.* 272, 273.

<sup>g</sup> Litt. s. 466.

<sup>h</sup> *Ibid.* s. 470.

<sup>i</sup> Co. Litt. 273.

release to him that is in possession of the land; for the occupancy of the releasee is a matter of sufficient notoriety already.

8. Confirmation.

8. A *confirmation* is of a nature nearly allied to a release. Sir Edward Coke defines it<sup>1</sup> to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, "have given, granted, ratified, approved and confirmed."<sup>2</sup> An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term: here the lease for years is voidable by him in reversion: [ 326 ] yet, if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure.<sup>3</sup> The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.

9. Surrender.

9. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined,<sup>4</sup> a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is usually done by these words, "hath surrendered, granted, and yielded up:" but these words<sup>5</sup> are not essential to a surrender. The surrenderor must be in possession;<sup>6</sup> and the surrenderee must have a higher estate, in which the estate surrendered may merge: therefore tenant for life cannot surrender to him in remainder for years,<sup>7</sup> although, as we have seen,<sup>8</sup> one term of years may merge in another. In a surrender there is no occasion for livery of seisin;<sup>9</sup> for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are

<sup>1</sup> 1 Inst. 295.

<sup>2</sup> Litt. s. 515, 531.

<sup>3</sup> *Ibid.* s. 516.

<sup>4</sup> Co. Litt. 337.

<sup>5</sup> 1 Wills. 127; Cro. Jac. 169.

<sup>6</sup> Co. Litt. 338.

<sup>7</sup> Perk. s. 589.

<sup>8</sup> *Ante*, p. 213; 5 Co. 11; 2 Prest. Conv. 138.

<sup>9</sup> Co. Litt. 50.

one and the same estate: and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the releasor, or confirmor, and the particular estate of the releasee or confirmee are one and the same estate: and where there is already a possession, derived from such a privity of estate, any further delivery of possession would be vain and nugatory.<sup>a</sup> By the common law no deed or writing was necessary to effect a surrender, but by the stat. of Frauds, 29 Car. II. c. 29, c. 3. s. 3, it must be by deed or writing.<sup>w</sup>

10. An *assignment* is properly a transfer, or making over to another, of the interest one has in *any* estate; but it is usually applied to disposition of chattels real and personal estate. The usual operative words are "assign, transfer, and set over." It differs from a lease only in this: that by a lease one grants an interest less than his own, [ 327 ] reserving to himself a reversion; in assignments, he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor, but the assignor is not released by the assignment from the covenants of the lease.<sup>x</sup>

10. Assign-  
ment.

11. A *defeazance* is a collateral deed, made at the same time with a feoffment or other deed, containing certain conditions upon the performance of which the estate then created or the other deed, may be defeated or totally undone.<sup>y</sup> And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law;<sup>z</sup> and, therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin,

Defeazance.

<sup>a</sup> Litt. s. 460.

<sup>w</sup> See *ante*, p. 349.

<sup>x</sup> As to assignments being in writing, see *ante*, p. 349.

<sup>y</sup> From the French verb *defaire*, *infectum, reddere*.

<sup>z</sup> Co. Litt. 236.

being allowed in those days of simplicity and truth: though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seisin could be had till the time of payment; and so also annuities, conditions, warranties, and the like,) were always liable to be recalled by defeazances made subsequent to the time of their creation.\* A defeazance is now very seldom used in conveyancing, except in reviving the condition of a lease.

II. The deeds operating under the statute of uses.

II. There yet remain to be spoken of the conveyances which have their force and operation by virtue of the statute of uses, of which we have already given some account,<sup>b</sup> and these are now much more frequently used than any we have hitherto mentioned, which are nearly superseded in practice. But it is to be observed, that one, at least, of the assurances to which we have already alluded may also take effect by virtue of the statute of uses, as well as at common law. Thus uses may undoubtedly be declared on the seisin acquired by the feoffee in a feoffment, and this was formerly by no means an unfrequent form of conveyance.<sup>c</sup> But we are now to speak of those conveyances which owed their origin to the statute of uses, which are,

[ 337 ]

12. Covenant to stand seised.

12. A twelfth species of conveyance, called a *covenant to stand seised to uses*, by which a man seised of lands, covenants, in consideration of blood or marriage with one of the covenantor's blood,<sup>d</sup> that he will stand seised of the same to the use of his child, wife, or kinsman for life, in tail or in fee, and although an existing estate for years cannot be transferred by a covenant to stand seised, yet a new estate for years may be created by this assurance.\* Under this assurance there is no transmutation of possession, but the statute executes at once the estate; for the party intending to be benefited, having thus acquired the use, is thereby put into possession of the legal estate,<sup>f</sup> without ever seeing it, by a kind of parliamentary magic. But

\* *Ibid.* 237.

<sup>b</sup> A portion of the text of Blackstone is here transposed. See *ante*, ch. 7, and *Introduction*.

<sup>c</sup> See Appendix, No. I.

<sup>d</sup> Com. Dig. *Covenant*, G. 3.

<sup>e</sup> See 3 Byth. Conv. 52 b.

<sup>f</sup> Bacon, *Use of the Law*, 151.

this conveyance can only operate when made upon such weighty and interesting considerations as those of blood or marriage; and for this reason this assurance is now almost entirely out of use in this country, because as no use can be declared on it, except on these considerations,<sup>g</sup> it is disqualified for effecting most of the usual purposes of a conveyance. A covenant to stand seised is what is called an *innocent* conveyance, and passes no interest but that which the covenantor can lawfully transfer. Contingent remainders, therefore, cannot be destroyed by it, nor will it discontinue an estate tail.<sup>h</sup>

13. A thirteenth species of conveyance introduced by [ 338 ] this statute is that by *bargain and sale* of lands, which is a kind of real contract, whereby the bargainor for some pecuniary consideration (for this is essential) bargains and sells, that is, contracts to convey the land to the bargainee, and becomes by such a bargain a trustee for or seised to the use of the bargainee; and then the statute of uses completes the purchase,<sup>i</sup> or as it hath been well expressed,<sup>k</sup> the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances thus made would want all those benefits of notoriety which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII., c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the Courts of Westminster Hall, or with the *custos rotulorum* of the county.<sup>l</sup> Clandestine bargains and sales of chattel interests or leases for years, were thought not worth regarding, as such interests were very precarious till about six years before,<sup>m</sup> which also occasioned them to be overlooked in framing the statute of uses; and therefore such bargains and sales are not directed to be enrolled. A bargain and sale is also what is termed an *innocent* conveyance, and operates only on what the grantor

13. Bargain and sale.

<sup>g</sup> *Tyrrrell's case*, Dy. 155.

<sup>h</sup> Gilb. Us. 140; *Seymour's case*, 10 Rep. 59; 1 Atk. 2.

<sup>i</sup> Bacon, 150.

<sup>k</sup> Cro. Jac. 697; *Barker v. Keate*, 2 Mod. 252.

<sup>l</sup> There is a similar act, (10 Car. 2, c. 1, s. 18,) as to Ireland.

<sup>m</sup> See *ante*, p. 168.

may lawfully convey. It will not therefore create a forfeiture<sup>n</sup> or destroy contingent remainders dependent upon a particular estate.<sup>o</sup> Uses under the statute cannot be declared on the seisin of the bargainee; they will be trusts recognised only in courts of equity.<sup>p</sup> From this circumstance, together with the publicity and trouble occasioned by the necessity of the enrolment, a bargain and sale is now rarely adopted, and it has been almost entirely superseded by,

[ 339 ] 14. A fourteenth species of conveyance, viz. by *lease and release*; first invented by serjeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as particularly Mr. Noy, attorney-general to Charles I.) have formerly doubted its validity.<sup>q</sup> It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration for one year, is made, or is supposed to be made, by the tenant of the freehold to the lessee or bargainee. Now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession*. He therefore having thus a vested interest in the lands, is capable of receiving a release of the freehold and reversion; which we have seen before, must be made to a person having a vested interest; and, accordingly, the next day, a release is granted to him.<sup>r</sup> This is held to supply the place of livery of seisin: and so a conveyance by lease and release is said to amount to a feoffment.<sup>s</sup>

But the lease for a year is now rarely or ever actually made, as it has been enacted by stat. 4 Vict. c. 21, s. 1, that every deed of release which shall be executed after the 15th of May, 1841, and which shall be expressed to be made in pursuance of this act, shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity, as if the releasing party or parties who

<sup>n</sup> Gilb. Us. 102.

<sup>o</sup> Gilb. Us. 102; Fearn, 472, 7th edit.

<sup>p</sup> This bargain and sale must not be confounded with a bargain and sale made in pursuance of a common law power,

or of a power contained in an act of parliament. See Sug. Pow. p. 1.

<sup>q</sup> 2 Mod. 252.

<sup>r</sup> See Appendix, No. II. s. 1, 2.

<sup>s</sup> Co. Litt. 270; Cro. Jac. 604.

shall have executed the same, had also executed in due form a lease for a year, although no such deed shall be executed. And by s. 2, the recital or mention of a lease for a year executed before the passing on this act, is to be evidence of the execution of such lease for a year. The effect of this act, therefore, is to dispense with the lease for a year; but the stamp of this instrument must be affixed to the release (s. 1), and a release operating by virtue of the act, will have the same effect as lease and release. It is to be observed, however, that a lease for a year may still be employed if the parties desire it.

In conveying real property, whether corporeal or incorporeal, unless some special purpose is to be answered, which requires the peculiar properties of the other assurances, the lease and release is now universally adopted. This mode of conveyance is to be preferred to a feoffment, as it requires no additional ceremony, such as livery of seisin, to complete it; and to a bargain and sale or covenant to stand seised, as it is more capable of carrying into effect the usual intentions of the parties, as uses can be declared of the seisin of the releasee, but not of that of the bargainee or covenantee: and in the conveyance of incorporeal hereditaments, it is generally more convenient than a grant, as all doubt as to the insertion of the word "*grant*" is thereby avoided.

Whatever may be conveyed to uses, may be conveyed by lease and release. Therefore any incorporeal hereditaments *in esse*, and which savour of the realty, may be conveyed by it.\* But it would be an improper conveyance for a personal annuity, or any other mere personalty, as in this case an assignment should be employed. Remainders and reversions are now very generally conveyed by this assurance, as it will obviate the necessity of proving that the particular estate was in existence at the time of the conveyance, which would be necessary if a grant were employed; although some practitioners endeavour to avoid this difficulty by endorsing on the grant the fact of the existence of the particular tenant. But a contingent re-

\* Cro. Eliz. 166.

mainder cannot be the subject of a lease and release, as there can be no seisin of it.<sup>†</sup>

15 Deeds to lead and declare uses, and in lieu of fines and recoveries.

15. To these assurances may be added deeds to *lead* or *declare the uses* of other more direct conveyances, as feoffments, fines, and recoveries, and deeds substituted in lieu of fines and recoveries: of which we shall speak in the next chapter.

16. Deeds of revocation of uses.

16. Deeds of *revocation of uses*: hinted at in a former page,<sup>‡</sup> and founded in a previous power, reserved at the raising of the uses,<sup>§</sup> to revoke such as were then declared; and to appoint others in the stead, which is incident to the power of revocation.<sup>¶</sup> And this may suffice for a specimen of conveyances founded upon the statute of uses; and will finish our observations upon such deeds as serve to *transfer* real property.

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Deeds used to charge lands.

Before we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to *convey*, but to *charge* or *incumber* lands, and to *discharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. Bond.

1. An *obligation* or bond is a deed<sup>‡</sup> whereby the obligor obliges himself, and usually his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio*; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living: and after his death the obligation descends upon his heir if named, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*

<sup>†</sup> Fearne Cont. Rem. 366, 7th edit.

<sup>‡</sup> Page 116.

<sup>§</sup> See Appendix, No. I. p. i.

<sup>¶</sup> Co. Litt. 237; 2 Ch. Ca. 36; 3

Keb. 7.

<sup>‡</sup> See Appendix, No. IV. p. xiv.



yet a *collateral*, charge upon the lands. How it affects the personal property of the obligor will be more properly considered hereafter. Is a charge on the obligor's lands.

Obligees may now, under the stat. 11 G. IV. & 1 W. IV. c. 47, maintain an action of *debt* against the heirs or devisees of obligors, though such heirs or devisees may have aliened the lands or hereditaments descended or devised to them before process sued out against them; and they are answerable for the bond debts of their ancestors or devisors to the value of the land so descended or devised. And now by the 3 & 4 W. IV. c. 104, it is enacted, that where any person shall die seised of any real estate, whether freehold or copyhold, the same shall be assets for the payment of all his just debts, as well due on simple contract as on specialty.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved: for no prudence or foresight of the obligor could guard against such a contingency.\* On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought: viz. his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained, upon non-performance of covenants; and the like. And the like practice having gained some footing in the courts of law,\* the statute 4 & 5 Ann, c. 16, at length enacted, in the same spirit of equity, that, in case of a bond, conditioned for the payment of

What conditions of bonds are void.

When a bond is forfeited, what may be recovered.

\* Co. Litt. 206.

<sup>b</sup> 2 Keb. 553, 555; Salk. 596, 597; 6 Mod. 11, 60, 101.

money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

2. Recognizance.

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorised,<sup>b</sup> with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record, the form whereof is, "that A. B. doth acknowledge to owe to our lord the King, to the plaintiff, to C. D. or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated: in which case the King, the plaintiff, C. D., &c., is called the cognizee, "*is cui cognoscitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit*." This, being certified either to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrolment on record.<sup>c</sup> There are also other recognizances, of a private kind, *in nature of a statute staple*, by virtue of the statute 23 Hen. VIII. c. 6, which have been already explained,<sup>d</sup> and shown to be a charge upon real property.

3. A Defeazance.

3. A defeazance, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed.\* This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

These are the principal species of deeds or matter in

<sup>b</sup> Bro. Abr. tit. *Recognizance*, 24.

<sup>d</sup> See page 193.

<sup>c</sup> Stat. 29 Car. 2, c. 8. See page

Co. Litt. 237; 2 Sand. 47.

*pais*. by which estates may be either conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent of any; though in these there is certainly one palpable defect, the want of sufficient notoriety: so that purchasers or creditors cannot know with any absolute certainty what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the ancient feudal method of conveyance (by giving corporal seisin of the lands) this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances; since the disuse of the old Saxon custom of transacting all conveyances at the county court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery;<sup>f</sup> and the failure of the general register established by King Richard the First, for the stars or mortgages [ 343 ] made to Jews, in the *capitula de Judæis*, of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland every act and event, regarding the transmission of property, is regularly entered on record.<sup>g</sup> And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature<sup>h</sup> to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it hath been doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention and omissions of parties, than prevented by the use of registers. The establishment of a general registry for all deeds relating to real property has, however, been recommended by the Real Property Commissioners in their second report; and a bill, founded on their recommendation, has been several times introduced into parliament, but never hitherto with success.

Defects of  
conveyances  
to uses.

<sup>f</sup> Hickes *Dissertat. epistolar.* 9.

<sup>h</sup> Stat. 2 & 3 Ann. c. 4; 6 Ann. c.

<sup>g</sup> Dalrymple on Feudal Property, 35; 7 Ann. c. 20; 8 Geo. 2, c. 6.

262, &c.

## CHAPTER THE TWENTY-THIRD.

## [ 344 ] OF ALIENATION BY MATTER OF RECORD.

Assurances  
by matter of  
record, what  
they are.

ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves : but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another ; or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The King's grants. 3. Fines. 4. Common recoveries. Which last two assurances have been recently abolished.

I. Private  
acts of par-  
liament.

I. Private *acts of parliament* are, especially of late years, become a very common mode of assurance. For it may sometimes happen, that by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances ; (a confusion in a great measure unknown to the simple conveyances of the common law ; ) so that it is out of the power of either the courts of law or equity to relieve the owner. Or, it may sometimes happen, that by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power, (as letting leases, making a jointure for a wife, or the like,) which power cannot be given him by the ordinary judges either in common law or equity. Or it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities ; who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of the like kind, the transcendant power of

Objects usu-  
ally effected  
by them.

[ 345 ] parliament is called in, to cut the Gordian knot ; and by a particular law, enacted for this very purpose, to

unfetter an estate ; to give its tenant reasonable powers ; to enable him to raise money for the payment of necessary repairs, or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. The practice was carried to a great length in the year succeeding the Restoration ; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it,<sup>a</sup> every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament : which occasioned the king at the close of the session to remark,<sup>b</sup> that the good old rules of law are the best security ; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates shall be too easily unsettled when they are dead, by the power of parliament.

Acts of this kind are however at present carried on, in both houses, with great deliberation and caution ; particularly in the House of Lords they are usually referred to two judges to examine and report the facts alleged, and to settle all technical forms. Nothing also is done without the consent, expressly given, of all parties in being and capable of consent, that have the remotest interest in the matter ; unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever ; except those whose consent is so given or purchased, and who are therein particularly named : though it hath been holden, that, even if such saving be omitted, the act shall bind none but the parties.<sup>c</sup>

Private acts  
are proceed-  
ed in with  
caution.

A law, thus made, though it binds all parties to the bill, [ 346 ] is yet looked upon rather as a private conveyance, than as

Are looked  
upon as con-  
veyances.

<sup>a</sup> Lord Clar. Contin. 162.

<sup>b</sup> *Ibid.* 163.

<sup>c</sup> Co. 138 ; Godb. 171.

the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions;<sup>d</sup> it hath been holden to be void, if contrary to law and reason;<sup>e</sup> and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains however enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance, so made or established.

II. The king's grants.

II. The *king's grants* are also matter of public record. For, as St. Germyn says,<sup>f</sup> "the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record." And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled: that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or aught besides, are contained in charters, or letters *patent*, that is, open letters, *literæ patentæ*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs, *close*, *literæ clausæ*: and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

Must first pass by bill.

[ 347 ]

Grants or letters patent must first pass by *bill*: which is prepared by the attorney and solicitor-general, in consequence of a warrant from the crown; and is then signed, that is, subscribed at the top, with the king's own *sign*

<sup>d</sup> *Richardson v. Hamilton*, Canc. 8, Jan. 1773; *M'Kenzie v. Stuart*, Dom. Proc. 13 Mar. 1754.

<sup>e</sup> 4 Rep. 12.

<sup>f</sup> Dr. & Stud. b. 1, d. 8.

*manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem*, by the king himself."<sup>a</sup> Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the Chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo*," by writ of privy seal.<sup>b</sup> But there are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy seal*.

Signed with  
the sign ma-  
nual.

The *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially for the king, and *against* the party: whereas the grant of a subject is construed must strongly *against the grantor*. Wherefore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis*;" and then they have a more liberal construction.<sup>c</sup> 2. A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted:<sup>d</sup> and if a feoffment of land was made by a lord to his villein, this operated as a manumission;<sup>e</sup> for he was otherwise unable to hold it. But the king's grants shall not enure to any other intent, than that which is precisely expressed in the grant. As, if he grants lands to an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant.<sup>m</sup> [ 348 ]

Different  
construction  
of a grant by  
the king and  
a private  
person.

<sup>a</sup> 9 Rep. 18.

<sup>b</sup> *Ibid.*; 2 Inst. 555.

<sup>c</sup> Finch. L. 100; 10 Rep. 112.

<sup>d</sup> Co. Litt. 56.

<sup>e</sup> Litt. s. 206.

<sup>m</sup> Bro. Abr. tit. *Patents*, 62; Finch. L. 110.

3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law: in any of these cases the grant is absolutely void.<sup>a</sup> For instance; if the king grants lands to one and his *heirs male*, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee-simple, as in common grants it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail:<sup>o</sup> the grantee is therefore (if any thing) nothing more than tenant at will.<sup>p</sup> And, to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6, that no grant of his shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands.

#### III. Fine.

III. We are next to consider what was, until very recently, a very usual species of assurance, which is also of record; viz. a *fine* of lands and tenements. And although no fine has been or could be levied since the 31st of December, 1833, after which time they were abolished by the stat. 3 & 4 W. IV. c. 74, yet as they must occur for a considerable period in titles to real property, it will still be necessary to explain briefly, 1st, The *nature* of a fine; 2. Its several *kinds*; and 3. Its *force* and *effect*.

##### I. The nature of a fine.

I. A fine is sometimes said to be a feoffment of record:<sup>q</sup> though it might with more accuracy be called, an acknowledgment of a feoffment on record. By which it is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands, though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin [ 349 ] is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however

<sup>a</sup> Freem. 172.

<sup>o</sup> Finch, 101, 102.

<sup>p</sup> Bro. Abr. tit. *Estates*, 34, tit. *Pa-*

*ents*, 104; Dyer, 270; Dav. 45.

<sup>q</sup> Co. Litt. 50.



fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question became, or were acknowledged to be, the right of one of the parties.\* In its original it was founded on an actual suit, commenced at law for the recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were every day commenced, for the sake of obtaining the same security.

A fine is so called because it puts an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament, 18 Edw. I. "*non in regno Angliæ providetur, vel est, aliqua securitas, major vel solennior, per quam aliquis statum certiores habere possit, neque ad statum suum verificandum aliquod solennius testimonium producere, quam finem in curia domini regis levatam: qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, et hac de causa providebatur.*" Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil<sup>a</sup> and Bracton<sup>c</sup> in the reigns of Henry II. and Henry III. as things then well known and long established; and instances have been produced of them even prior to the Norman invasion.<sup>b</sup> So that the statute 18 Edw. I. called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied or carried on. And that is as follows:

1. The party to whom the land was to be conveyed or [ 350 ] assured, commenced an action or suit at law against the other, generally an action of covenant, by suing out a writ of *præcipe*, called a writ of covenant: the foundation of which was a supposed agreement or covenant that the one should convey the lands to the other; on the breach of which agreement the action was brought. On this writ there was due to the king, by ancient prerogative, a *primer*

Mode in  
which fines  
were levied.  
Writ of  
*præcipe*.

<sup>a</sup> Co. Litt. 120.

<sup>b</sup> L. 8, c. 1.

<sup>c</sup> L. 5, t. 5, c. 28.

<sup>d</sup> Plowd. 369.

*fine*, or a noble for every five marks of land sued for; that is, one tenth of the annual value. The suit, being thus commenced, then followed,

*Licentia  
concordandi.*

2. The *licentia concordandi*, or leave to agree the suit. For, as soon as the action was brought, the defendant, knowing himself to be in the wrong, was supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangered if he deserted it without licence, he therefore applied to the court for leave to make the matter up. This leave was readily granted, but for it there was also another fine due to the king by his prerogative, which was an ancient revenue of the crown, and was called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it was as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land: that is, three-twentieths of the supposed annual value.

*Concord.*

[ 351 ]

3. Next came the *concord*, or agreement, itself, after leave obtained from the court, which was usually an acknowledgment from the deforciants (or those who kept the other out of possession) that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine was called the cognizor, and he to whom it was levied the cognizee. This acknowledgment must have been made either openly in the Court of Common Pleas, or before the lord chief justice of that court; or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*; which judges and commissioners were bound by statute 18 Edw. I. st. 4, to take care that the cognizors were of full age, sound memory, and out of prison. If there were any feme-covert among the cognizors, she was privately examined whether she did it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine were completed; and, if the cognizor died the next moment after the fine was acknowledged, provided it were subsequent to the day on which the writ was made returnable, still the

fine was carried on in all its remaining parts: of which the next was,

4. The *note* of the fine; which was only an abstract of <sup>The nota.</sup> the writ of covenant, and the concord: naming the parties, the parcels of land, and the agreement. This must have been enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

5. The fifth part was the *foot* of the fine, or conclusion <sup>Foot.</sup> of it; which included the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there were indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine was completely levied at common law.

By several statutes still more solemnities were superad- <sup>Statutes relating to fines.</sup> ded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And first, by 27 Edw. I., c. 1, the note of the fine was to be openly [ 352 ] read in the Court of Common Pleas, at two several days in one week, and during such reading all pleas were to cease. By 5 Hen. IV., c. 14, and 23 Eliz. c. 3, all the proceedings on fines, either at the time of acknowledgment, or previous, or subsequent thereto, were to be enrolled of record in the Court of Common Pleas. By 1 Ric. III., c. 7, confirmed and enforced by 4 Hen. VII., c. 24, the fine, after engrossment, was to be openly read and proclaimed in court (during which all pleas were to cease) sixteen times; viz. four times in the term in which it was made, and four times in each of the three succeeding terms; which was reduced to once in each term by 31 Eliz. c. 2, and these proclamations were indorsed on the back of the record. It was also enacted by 23 Eliz. c. 3, that the chirographer of fines should every term write out a table of the fines levied in each county in that term, and should affix them in some open part of the Court of Common Pleas all the next term: and should also deliver the contents of such table to the sheriff of every county, who should at the next assizes fix the same in some open place in the court, for the more public notoriety of the fine.

II. Fines are  
of four kinds.  
Fine *sur*  
*cognizance*  
*de droit come*  
*ceo.*

II. Fines, thus levied are of four kinds. 1. What in our law French is called a fine "*sur cognizance de droit come ceo que il ad de son done*;" or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This was the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance than a conveyance now originally made; for the deforciant, or cognizor, acknowledges, *cognoscit*, the right, to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself, the cognizor.

[ 353 ]  
Fine *sur*  
*cognizance*  
*de droit tantum.*

2. A fine "*sur cognizance de droit tantum*," or, upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This was commonly used to pass a *reversionary* interest, which was in the cognizor. For of such reversions there could be no feoffment, or donation with livery, supposed; as the possession during the particular estate belonged to a third person.\* It was worded in this manner; "that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs that the reversion, after the particular estate determines, shall go to the cognizee."

Fine *sur*  
*concessit.*

3. A fine "*sur concessit*" was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this might be done reserving a rent, or the like: for it operated as a new grant. 4. A fine, "*sur done, grant, et render*," was a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c. and the fine *sur concessit*: and might be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo*, &c. conveyed nothing but an absolute estate,

Fine *sur*  
*done, grant,*  
*et render.*

\* Moor. 629.

either of inheritance or at least of freehold.\* In this last species of fine, the cognizee, after the right was acknowledged to be in him, granted back again, or rendered to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, *sur cognizance de droit come ceo, &c.* was the most used, as it conveyed a clean and absolute freehold, and gave the cognizee a seisin in law, without any actual livery; and was therefore called a fine executed, whereas the others were but executory. The third, however, was also not unfrequently resorted to for conveying life estates and the interests of married women, and for creating terms of years to bind by way of estoppel their contingent or executory estates and interests. The second and fourth have been rarely used of late.†

*Fine sur cognizance de droit come ceo, the most common.*

III. We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36. The ancient common law, with respect to this point, is very forcibly declared by the statute 18 Edw. I., [ 354 ] in these words. "And the reason why such solemnity is required in the passing of a fine, is this; because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the fine levied; unless they put in their claim on the foot of the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was abolished for a time by a statute made in 34 Edw. III. c. 16, which admitted persons to claim, and falsify a fine, at any indefinite distance:‡ whereby, as Sir Edward Coke observes,§ great contention arose, and few men were sure of their possessions, till the parliament held 4 Hen. VII. reformed that mischief, and excellently moderated between the latitude given by the statute and the rigour of the common law. For the statute then made,‖ restored the doctrine

III. The force and effect of a fine.

\* Salk. 340.

‡ 2 Inst. 518.

† See 1 Real Prop. Rep. 13.

§ 4 Hen. 7, c. 24, and see *ante*, p.

‡ Litt. s. 441.

132.

Effect of a fine in barring by non-claim.

of non-claim ; but extended the time of claim. So that by that statute, the right of all strangers whatsoever was bound, unless they made claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made : except feme-coverts, infants, prisoners, persons beyond the seas, and such as were not of whole mind ; who had five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

[ 355 ]

32 Hen. VIII. c. 36, enacts, that a fine shall bar an entail.

It seems<sup>c</sup> to have been the intention of that politic prince, king Hen. VII. to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay them the more open to alienation, being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, (which they were expressly declared *not* to be by the statute *de donis*.) the statute 32 Hen. VIII. c. 36, was thereupon made ; which removed all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands had been entailed, should be a perpetual bar to them and their heirs claiming by force of such entail : unless the fine were levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure ;<sup>d</sup> or unless it were of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

Who are bound by a fine.

From this view of the common law, regulated by these statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties*, *privies*, and *strangers*.

Parties.

Effect of a fine in conveying the estate of a married woman.

The *parties* are either the cognizors, or cognizees ; and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this was almost the only act that a *feme covert*, or married woman,

<sup>c</sup> But see Harg. Co. Litt. 121 a, n. <sup>d</sup> ferently considered.  
(f), where the various statutes are dif-

<sup>d</sup> See stat. 11 Hen. 7, c. 20.

was permitted by law to do, (and that because a real action for the freehold<sup>c</sup> was pending, and because she was privately examined as to her voluntary consent, which removed the general suspicion of compulsion by her husband,) it was therefore the usual and almost the only safe method, whereby she could join in the sale, settlement or incumbrance, of any estate.

Privies to a fine are such as are any way related to the parties who levied the fine, and claimed under them by any right of blood, or other right of representation. Such as are the heirs general of the cognizor, the issue in tail, since the statute of Henry the Eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied.<sup>d</sup> [ 356 ]

Strangers to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless within five years after proclamations made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons who are thus incapacitated to prosecute their rights had five years allowed them to put in their claims after such impediments were removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, had five years allowed them to claim in, from the time that such right accrued.<sup>e</sup> And if within that time they neglected to claim, or, (by the statute 4 Ann, c. 16,) if they did not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever were barred of whatever right they might have, by force of the statute of non-claim.

But, in order to make a fine of any avail at all, it is necessary that the parties should have had some interest or estate in the lands to be affected by it. Else it had been

<sup>c</sup> Harg. Co. Litt. 121 a, n.

<sup>e</sup> Co. Litt. 372.

<sup>d</sup> 3 Rep. 87.

possible that two strangers, by a mere confederacy, might without any risk have defrauded the owners by levying fines of their lands; for if the attempt were discovered, they could be no sufferers, but must have only remained *in statu quo*: whereas if a tenant for life levied a fine, it was an absolute forfeiture of his estate to the remainderman or reversioner,<sup>f</sup> if claimed in proper time. It is not therefore to be supposed that such tenants would frequently run so great a hazard; but if they did, and the claim was not duly made within five years after their respective terms expired,<sup>g</sup> the estate was for ever barred by it. Yet where a stranger, whose presumption could not thus be punished, officiously interfered in an estate which in no wise belonged [ 357 ] to him, his fine was of no effect; and might at any time have been set aside (unless by such as are parties or privies thereto<sup>b</sup>) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who had only a chattel interest, and no freehold in the land, levied a fine, it operated nothing, but was liable to be defeated by the same plea.<sup>i</sup> Wherefore, when a lessee for years was disposed to levy a fine, it was usual for him to make a feoffment first, to displace the estate of the reversioner,<sup>k</sup> and create a new freehold by disseisin; but as we have seen<sup>l</sup> this effect of a feoffment is now much disputed. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, bound the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or not, if they failed to put in their claims within the time allotted by law.

IV. Common recovery.

IV. The fourth species of assurance, by matter of record, was a *common recovery*; but by the stat. 3 & 4 W. IV., c. 74, which took effect on the 31st of December, 1833, it is abolished after that time. Concerning the original of this assurance it was formerly observed,<sup>m</sup> that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV., in order to put

<sup>f</sup> Co. Litt. 251.

<sup>g</sup> 2 Lev. 52.

<sup>h</sup> Hob. 334.

<sup>i</sup> 5 Rep. 123; Hardr. 401.

<sup>k</sup> Hardr. 402; 2 Lev. 52.

<sup>l</sup> See *ante*, p. 369.

<sup>m</sup> See *ante*, pp. 135, 316.



an end to all fettered inheritances, and bar not only estates tail, but also all remainders and reversions expectant thereon. I am now therefore only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

1. And, first, the *nature* of it; or what a common recovery is, or rather was, for as we have before observed, it is now abolished. A common recovery then was so far like a fine, that it was a suit or action, either actual or fictitious: and in it the lands were *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, bound all persons, and vested a free and absolute fee-simple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student. However I shall endeavour to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms, and phrases not hitherto interpreted. [ 358 ]

The nature  
of a common  
recovery.

Let us, in the first place, suppose David Edwards to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding brought an action against him for the lands; and he accordingly sued out a writ, called a *præcipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleged that the defendant Edwards (there called the tenant) had no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited: whereupon the tenant appeared and called upon one Jacob Morland, who was supposed at the original purchase to have warranted the title to the tenant; and thereupon he prayed that the said Jacob Morland might be called in to defend the title which he so warranted. This was called the *voucher*,

How a re-  
covery was  
suffered.

*vocatio*, or calling of Jacob Morland to warranty; and Morland was called the *vouchee*. Upon this, Jacob Morland, the *vouchee*, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the court to *imparl*, or confer with the *vouchee* in private; which was (as usual) allowed him. And soon afterwards the demandant Golding returned to court, but Morland the *vouchee* disappeared or made default. Whereupon judgment was given for the demandant Golding, then called the *recoveror*, to recover the lands in question against the tenant, Edwards, who was [ 359 ] then the *recoveree*: and Edwards had judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and then lost by his default; which is agreeable to the doctrine of warranty. This was called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the *cryer* of the court, (who, from being frequently thus vouched, was called the *common vouchee*,) it is plain that Edwards had only a nominal recompense for the lands so recovered against him by Golding; which lands are now absolutely vested in the said *recoveror* by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail to Golding the purchaser.

Recovery was with single, double, or treble voucher.

The recovery, here described, was with a *single* voucher only; but sometimes it was with *double*, *treble*, or farther voucher, as the exigency of the case might require. And indeed it was usual always to have a recovery with double voucher at the least: by first conveying an estate of freehold to any indifferent person, against whom the *præcipe* was brought; and then he vouched the tenant in tail, who vouched over the common *vouchee*. For, if a recovery were had immediately against a tenant in tail, it barred only such estate in the premises of which he was then actually seised; whereas if the recovery were had against another person, and the tenant in tail were vouched, it barred every latent right and interest which he might have in the lands recovered.<sup>a</sup> If Edwards therefore were tenant

<sup>a</sup> Bro. Abr. tit. *Tails* 32; Plowd. 8.

of the freehold in possession, and John Barker tenant in tail in remainder, here Edwards first vouched Barker, and then Barker vouched Jacob Morland, the common vouchee, who was always the last person vouched, and always made default: whereby the demandant Golding recovered the land against the tenant Edwards, and Edwards recovered a recompense of equal value against Barker the first vouchee; who recovered the like against Morland the common vouchee, against whom such ideal recovery in [ 360 ] value was always ultimately awarded.

This supposed recompense in value is the reason why the issue in tail was held to be barred by a common recovery. For, if the recoveree should obtain a recompense in lands from the common vouchee (which there was a possibility in contemplation of law, though a very improbable one, of his doing) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail.<sup>o</sup> This reason also held, with equal force, as to *most* remainder-men and reversioners; to whom the possibility remained and reverted as a full recompense for the reality, which they were otherwise entitled to: but it did not *always* hold; and therefore, as Pigott says,<sup>p</sup> the judges have been even *astuti*, in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that, though the estate-tail went from the recoveree, yet it was not *destroyed*, but only *transferred*; and still subsisted, and ever continued to subsist (by construction of law) in the recoveror, his heirs, and assigns: and, as the estate-tail so continued to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail would never take place.

To such awkward shifts, such subtle refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. The design, for which these contrivances were set on foot, was certainly laudable; the unrivetting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our

Recompense  
in value,  
effect of.

Attempts to  
bar estates  
tail.

<sup>o</sup> Dr. & St. b. 1, dial. 28.

<sup>p</sup> Of Com. Recov. 13, 14.

[ 361 ] modern courts of justice have indeed adopted a more manly way of treating the subject; by considering common recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands.<sup>1</sup> “But,” says Blackstone, “since the ill consequences of fettered inheritances are now generally seen and allowed, and of course the utility and expedience of setting them at liberty are apparent; it hath often been wished, that the process of this conveyance was shortened, and rendered less subject to niceties, by either totally repealing the statute *de donis*; which perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by vesting in every tenant in tail of full age the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or, lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, and the decisions of our own courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable* use, but, also by the precedent of the statute 21 Jac. I, c. 19, [now re-enacted by stat. 3 & 4 W. IV. c. 74,] which, in case of a bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers concerned in passing recoveries are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrolment.” And it will be hereafter seen that the legislature has taken the advice here given, and that a tenant in tail may now by a deed enrolled acquire the fee-simple.

The force  
and effect of  
a common  
recovery.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to have been an absolute

<sup>1</sup> Co. Litt. 372 b; Hard. 409. See *ante*, p. 135.

bar not only of all estates tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail might, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. c. 20, no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion remained in the king, barred such estate-tail, or the remainder or reversion of [ 362 ] the crown. And by the statute 11 Hen. VII. c. 20, no woman, after her husband's death, could suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors. And by stat. 14 Eliz. c. 8, no tenant for life, of any sort, could suffer a recovery so as to bind them in remainder or reversion. For which reason, if there were tenant for life, with remainder in tail, and other remainders over, and the tenant for life were desirous to suffer a valid recovery; either he, or the tenant to the *præcipe* by him made, must have *vouched* the remainder-man in tail, otherwise the recovery was void: but if he vouched such remainder-man, and he appeared and vouched the common vouchee, it was then good; for if a man were vouched and appeared and suffered the recovery to be had against the tenant to the *præcipe*, it was as effectual to bar the estate-tail as if he himself had been the recoveree.<sup>9</sup>

To bar entails and remainders.

In all recoveries it was necessary that the recoveree, or tenant to the *præcipe*, as he was usually called, should be actually seised of the freehold, else the recovery was void.<sup>r</sup> For all actions to recover the seisin of lands, must have been brought against the actual tenant of the freehold, else the suit would lose its effect; since the freehold cannot be recovered of him who has it not. And, though these recoveries were in themselves fabulous and fictitious, yet it was necessary that there be *actores fabulæ*, properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, was removed in some measure by the provisions of the statute 14 Geo. II.

In recoveries the tenant to the *præcipe* must have been seised of the freehold; but this rule is now altered in certain cases by stat. 14 G. 2, c. 20.

<sup>9</sup> Salk. 571.

<sup>r</sup> Pigot, 28.

c. 20, which enacted with a retrospect and conformity to the ancient rule of law,\* that though the legal freehold were vested in lessees, yet those who were entitled to the next freehold estate in remainder or reversion might make a good tenant to the *præcipe*; that though the deed or fine which created such tenant were subsequent to the judgment of recovery, yet if it were in the same term, the recovery should be valid in law; and that, though the recovery itself did not appear to be entered, or were not regularly entered, on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, should, after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And by the stat. 3 & 4 W. IV. c. 74, s. 10, it is enacted, that no recovery shall be invalid in consequence of the neglect to inrol, in due time, the bargain and sale for making the tenant to the *præcipe*, (provided such recovery would otherwise have been valid,) nor, by s. 11, in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the *præcipe*, provided the person who was the owner of an estate in possession, not less than an estate for life in the lands, shall, within the time limited for making such tenant, have conveyed such estate in possession to the tenant to such writ, and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent was reserved, or any term of years upon which no rent is reserved. And this may suffice to give the student a general idea of common recoveries.

Deeds to lead  
or declare  
the uses of  
fines and re-  
coveries.

Before I leave the subject of fines and recoveries, I must add a word concerning deeds to *lead* or to *declare*, the *uses* of these assurances. For if they have been levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, would have enured only to the use of him who levied or suffered them.<sup>1</sup> And if a consideration appeared, yet as the most usual fine, "*sur cognizance de droit come ceo, &c.*" conveyed an absolute estate, without any limitations, to the cognizee; and

\* Pigot. 41, &c.; 4 Burr. 1, 115.

<sup>1</sup> Dyer, 18.

as common recoveries did the same to the recoveror, these assurances could not have been made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient,) unless their force and effect had been subjected to the direction of other more complicated deeds, wherein particular uses could be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, might be applied and directed to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And, if these deeds were made previous to the fine or recovery, they were called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As, if A. tenant in tail, with reversion to himself in fee, would have settled his estate on B. for life, remainder to C. in tail, remainder to D. in fee; this was what, by law, he had no power of doing effectually, while his own estate-tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine (or, if there were any intermediate remainders, to suffer a recovery) to E., and directed that the same should enure to the uses in such settlement mentioned. This was a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, enured to the uses so specified and no other. For though E., the cognizee or recoveror, had a [ 364 ] fee-simple vested in himself by the fine or recovery; yet, by the operation of this deed, he became a mere instrument or conduit-pipe, seised only *to the use* of B., C., and D., in successive order: which use was executed immediately by force of the statute of uses. Or, if a fine or recovery were had without any previous settlement, and a deed were *afterwards* made between the parties, *declaring* the uses to which the same should be applied, this would have been equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by statute 4 & 5 Ann, c. 16, indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, should be good and effectual in law, and the fine and recovery should enure to such uses, and be esteemed to be only in trust,

notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. II. c. 3, to the contrary.

Amendment  
of fines and  
recoveries.

Where the description of the names of the parties or of the premises comprised in a fine did not accord with the deed leading or declaring the uses of fines and recoveries, the Court of Common Pleas, on an application for that purpose, would allow the record of the fine or recovery to be amended;<sup>a</sup> but by the 3 & 4 W. IV. s. 74, the necessity for an application of this nature is dispensed with, it being enacted (s. 7 & 8), that when it is apparent from the deed declaring the uses of a fine, or for making the tenant to the *præcipe* for suffering a recovery, that there is in the record of the fine or recovery any misdescription of this nature, the fine or recovery shall be as valid as the same would have been if there had been no such error or misdescription. But the jurisdiction of the Court of Common Pleas to amend a fine or recovery in any other case is preserved by s. 9.<sup>v</sup>

Fines and  
recoveries  
abolished by  
the 3 & 4  
W. IV. c. 74.

Having thus given a pretty full account of these fictitious assurances called fines and recoveries, which were in constant use down to the end of the year 1833, when they were abolished by the 3 & 4 W. IV., c. 74, s. 2,<sup>x</sup> we now propose to give the chief particulars relating to the assurance which is substituted by that statute in their place. But I shall first mention the guard which the legislature, in removing these restrictions, has thrown round the alienation of property: for it is to be remembered, that although most of the rules relating to fines and recoveries were purely technical, and in this liable to objection, yet that great practical benefits resulted from them. They gave parents the means of checking the improvidence of their children in their dealings with their property, and facilitated advantageous family arrangements. In altering the law,

Benefits of  
fines and  
recoveries  
preserved by  
the recent  
act.

<sup>a</sup> *Tregare v. Gennys*, Pig. 218; *Forster v. Ballington*, Barnes, 216; 5 Cru. Dig. 148.

<sup>v</sup> See 5 Vict. c. 22. "An act for better recording fines and recoveries in Wales and Cheshire."

<sup>x</sup> "Except where parties intending

to levy a fine or common recovery, shall on or before the 31st day of December, 1833, have sued out a writ of *dedimus*, or any other writ, in the regular proceedings of such fine or recovery." s. 2.



therefore, it was proper to preserve its benefits, and for this purpose, although the concurrence of the person having the immediate estate of freehold is dispensed with as seised of that estate, yet instead of such concurrence, where a beneficial estate either for life or years determinable on lives, or of any greater estate, not being a lease on which rent shall be reserved, shall be limited prior to the estate tail intended to be barred, any disposition by the tenant in tail shall be made with the concurrence of the person to whom such prior estate shall have been limited.<sup>7</sup> This person is called *the protector of the settlement*, and we shall proceed to specify who is to be considered as such.

Protector of the settlement.

Whenever there shall be a tenant in tail, and there shall be subsisting in the same lands, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, then such owner of the prior estate, or the first of such estates, if more than one, shall be the protector of the settlement (3 & 4 W. IV., c. 74, s. 22); and where two or more persons shall be owners under a settlement of the prior estate, each of them shall be the sole protector as to his share (s. 23). Where a married woman would if single be the protector, in respect of a prior estate which is not settled to her separate use, she and her husband shall in respect of such estate be the protector, but if such prior estate shall have been settled to her separate use, then she alone shall be the protector (s. 24). But no tenant in dower, heir, executor, administrator, or bare trustee, shall be the protector (s. 27); and there are some other special cases of protectorship provided for by the act, which need not be here particularly mentioned.

Who shall be such.

Any person entailing lands may in the settlement appoint any number of persons *in esse*, not exceeding three, not being aliens, the protector of the settlement in lieu of the person who would have been the protector if a clause of this nature had not been inserted (s. 32). And when the protector shall be a lunatic, or person of unsound mind,

Power to appoint protector.

<sup>7</sup> See First Real Prop. Rep.

the Lord Chancellor,\* or where a traitor or felon, the Court of Chancery, shall be the protector (s. 33).

Consent of protector, where necessary, on alienation by tenant in tail.

When there is a protector of a settlement, his consent is requisite to enable an actual tenant in tail to create a larger estate than a base fee<sup>a</sup> (s. 33); and when an estate tail shall have been converted into a base fee, the consent of the protector shall be requisite to enable the owner thereof to acquire the fee under the act (s. 35); and the protector in exercising his power of consent is to be under no control whatever (s. 36).

The assurance substituted in lieu of fines and recoveries.

We have now to consider the assurance which is substituted by the late act for the fine or recovery. By s. 40, it is enacted that every tenant in tail may effect a disposition under the act by any of the assurances (not being a will) by which such tenant in tail could have made the disposition if he had been a tenant in fee-simple. It may therefore be a feoffment, a bargain and sale, or lease and release, or if the estate tail be not in possession, a grant; but for the reason already given, a lease and release is in general to be preferred in all cases to any other.<sup>b</sup> But every such assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack-rent, or not less than five-sixths part of a rack-rent, shall be inoperative unless enrolled in Chancery within six calendar months of the execution thereof (s. 41); but when enrolled it takes effect from the execution, as if enrollment had not been required (s. 74). And the consent of the protector, if there be one, must be given either by the same assurance, or by a distinct deed (s. 42); and if by a distinct deed, it is to be considered unqualified unless the assurance be referred to (s. 43); and once given, the protector cannot revoke his consent (s. 44). Where a married woman, as

Consent of protector, how it may be given.

\* The Lord Chancellor is not the protector of the settlement in the place of the lunatic, when the lunatic is tenant in tail in possession. *In re Wood*, 3 Myl. & C. 266; and see *In re Newman*, 2 Myl. & C. 112. The Court of Chancery is not the protector of a settlement where the tenant for life is a married woman, whose husband

has been convicted of felony, and the life estate is not settled to her separate use. *In re Wainwright*, ex parte Slade, 11 Sim. 352.

<sup>a</sup> As to a base fee, see *ante*, p. 123.

<sup>b</sup> As to these assurances, see *ante*, pp. 362, 370, 383, 384, and Appendix, I. II. III. V.

in the case before adverted to, is protector, she may consent as a feme sole (s. 45), and the consent of a protector by a distinct deed is void, unless enrolled with or before the assurance (s. 46). Courts of Equity are excluded from giving any effect to dispositions by tenants in tail or consents of protectors of settlements, which in courts of law would not be effectual (s. 47); and when the Lord Chancellor is protector, he shall have power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary, and if any other person is joint protector, the disposition shall not be valid without the consent of such person (s. 48); and the order of the Lord Chancellor is to be evidence of his consent (s. 49.)

Here we may close our account of this important act, which has abolished a mass of legal fiction, and introduced a substitute which, preserving all the benefits of the old assurances, is admirable for its simplicity, well adapted to the present state of society, and has answered the ends for which it was designed.<sup>c</sup>

<sup>c</sup> This statute has several important objects besides the abolition of fines and recoveries, as the enabling a bankrupt tenant in tail to bar the estate tail and remainders, (see *ante*, p. 333.)

—the enabling a married woman to convey her estates and rights in real property, (see *ante*, p. 343)—and the conveyance of estates tail in copyholds, see *post*, p. 417.

## [ 365 ] CHAPTER THE TWENTY-FOURTH.

## OF ALIENATION BY SPECIAL CUSTOM.

Assurances  
by special  
custom; to  
what lands  
they are  
confined.

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This therefore is a very narrow title: being confined to copyhold lands, and such customary estates as are holden in ancient demesne, or in manors of a similar nature: which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for as that might tend to defeat the lord of his signiory, it is therefore a forfeiture of a copyhold. <sup>a</sup> Nor are copyholds strictly transferable by matters of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by *surrender*; though in some manors, by special custom, recoveries might have been suffered of copyholds: <sup>b</sup> but these differed in nothing material from recoveries of free land, save only that they were not suffered in the king's courts, but in the court baron of the manor; and they are now altogether abolished by the statute 3 & 4 W. IV., c. 74, which we have already fully considered. <sup>c</sup> But copyholds may now be recovered by ejectment in the king's courts. <sup>d</sup>

Surrender.

Surrender, *sursumredditio*, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, it may be, to the use and behoof of A. and his heirs; to the use of his own will; and the like. The process, in most manors, [ 366 ] is, that the tenant comes to the steward, either in court or out of court, even without a special custom, <sup>e</sup> or else

<sup>a</sup> Litt. s. 74.

<sup>b</sup> Moor. 637; and 1 Prest. Conv. 156, 159.

<sup>c</sup> See *ante*, p. 410, and *post*, 417.

<sup>d</sup> See Litt. s. 76; and *Widdowson*

*v. Earl of Harrington*, 1 J. & W. 549.

<sup>e</sup> *Dudfield v. Andrews*, 1 Salk. 184; *Tukeley v. Hawkins*, 1 Lord Raym. 76.

to two customary tenants of the same manor, provided there be also a custom to warrant it; and there by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor, will warrant. If the surrender be made out of court, then, at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender in court, or upon presentment of a surrender made out of court, the lord, by his steward, grants the same land again to *cestui que use*, (who is sometimes, though rather improperly, called the surrenderee,) to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporeal seisin of the lands and tenements. Upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

In this brief abstract of the manner of transferring copyhold estates we may plainly trace the visible footsteps of the feudal institutions. The fief, being of a base nature and tenure, is unalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his successor; but formerly it was far otherwise. And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands: for the alienee of a copyhold had merely *jus fiduciarium*, for which there was no remedy [ 367 ] at law, but only by *subpœna* in the chancery.<sup>f</sup> When therefore the lord hath accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another

<sup>f</sup> Cro. Jac. 568.

person, either then expressly named or to be afterwards named in the tenant's will, the chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV.<sup>s</sup> was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the use of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the license of alienation. Add to this the plain feudal investiture, by delivering the symbol of seisin in presence of the other tenants in open court; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quæ saltem coram duobus vasallis solemniter fieri debet*:"<sup>b</sup> and, to crown the whole, the oath of fealty is annexed, the very bond of feudal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestibly prove the very universal reception, which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

Surrender is essential to the conveyance of a copyhold estate.

[ 368 ]

This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment or grant has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law; but we must surrender to each other's use, and the lord will admit us accordingly. If I would devise a copyhold, I must until lately have surrendered it to the use of my last will and testament; and in my will I must have declared my intentions, and have named a devisee, who would then be entitled to admission.<sup>1</sup> But now copyhold devises are good without surrender to the use of the will.<sup>2</sup> A fine or recovery had of copyhold lands in the King's court might indeed, if not duly reserved, alter the tenure of the lands, and convert

<sup>s</sup> Bro. Abr. tit. *Tenant per copie*. 10.

<sup>1</sup> Co. Copyh. s. 36.

<sup>b</sup> Feud. l. 2, t. 2.

<sup>k</sup> 55 Geo. 3, c. 192; 1 Vict. c. 26; and *post*, ch. 25.

them into frank-fee,<sup>1</sup> which is defined in the old book of tenures<sup>m</sup> to be "land pleadable at the common law:" but upon an action on the case, in the nature of a writ of a *deceit*, brought by the lord in the King's court, such fine or recovery would have been reversed, the lord would have recovered his jurisdiction, and the lands would have been restored to their former state of copyhold. But as we have already seen,<sup>n</sup> fines and recoveries are now abolished by the 3 & 4 W. IV. c. 74.

This statute and all its clauses, so far as the different tenures will admit, are to apply to copyholds, except that a disposition of any such lands shall be made by surrender (s. 50); and if the consent of the protector<sup>o</sup> of a settlement to the disposition of such lands shall be given by deed, such deed shall be produced to the steward, who shall endorse an acknowledgment to that effect, and such deed with the indorsement shall be entered on the court rolls of the manor, and the indorsement shall be *prima facie* evidence that the deed was so produced (s. 51). When the consent of the protector of a settlement of copyholds is not given by deed, evidence of such consent shall be preserved on the court rolls (s. 52). Power is given to equitable tenants in tail of copyholds to dispose of their lands by deed (s. 53), but this section only applies to equitable estates;<sup>p</sup> and it is further enacted, that the provisions of the statute relating to enrolment<sup>q</sup> shall not extend to copyholds (s. 54). The only mode of alienating copyholds, therefore, now existing, is by surrender, which we shall proceed to consider; but it will be proper first to advert to assurances by matter of record of lands in ancient demesne.

Alienation of copyholds by tenant in tail under the statute 3 & 4 W. IV. c. 74.

Lands of this tenure are within the jurisdiction of the Court of Common Pleas, and a fine or recovery levied or suffered of them was in force between the parties, and was voidable only by the lord,<sup>r</sup> by writ of *deceit*, and the lands

Lands in ancient demesne.

<sup>1</sup> Old *Nat. Brev. t. brieve de recto clause*. F. N. B. 13.

<sup>m</sup> *T. tenir en franks fee*.

<sup>n</sup> See *ante*, p. 410.

<sup>o</sup> As to the protector, see *ante*, p. 410.

<sup>p</sup> *Reg. v. Lord of the Manor of Ingleton*, 8 Dowl. 693.

<sup>q</sup> See *ante*, p. 413.

<sup>r</sup> 1 Prest. Conv. 266; and First Real Prop. Rep.

Fines and recoveries of lands in ancient demesne.

became frank-fee. But by the stat. 3 & 4 W. IV. c. 74, s. 4, it is enacted, that fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, might be reversed, as to the lord, by writs of deceit, the proceedings in which were then pending, or by writs of deceit thereafter to be brought, but should be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord; and (by s. 5) fines and recoveries of land in ancient demesne, levied or suffered in the manor court after other fines and recoveries in a superior court, shall be as valid as if the tenure had not been changed, and fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised; and it is further provided, (s. 6,) that the tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, shall be restored in cases in which the right of the lord of the manor shall have been recognised within twenty years. It is further to be observed that the writ of deceit is abolished, by the 3 & 4 W. IV. c. 27, s. 36.\* Having mentioned thus much as to fines and recoveries of lands in ancient demesne, let us return to surrenders of copyhold lands.

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

1 Surrender, effect of.

1. A surrender, by an admittance subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestui que use*, the lord taketh notice of the surrenderor as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo*; for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance, according to Blackstone. If he enters, he is

\* As to lands in ancient demesne, see further *ante*, pp. 102, *et seq.*



a trespasser, and punishable in an action of trespass:<sup>1</sup> and if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio*; because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good, which was *ab initio* void.<sup>a</sup> Yet, though upon [ 369 ] the original surrender the nominee hath but a possibility, it is however such a possibility, as may whenever he pleases be reduced to a certainty; for he cannot either by force or fraud be deprived or deluded of the effect and fruits of the surrender; but if the lord refuse to admit him, he is compellable to do it by a bill in Chancery, or a *mandamus*:<sup>w</sup> and the surrenderor can in no wise defeat his grant; his hands being for ever bound from disposing of the land in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act;<sup>x</sup> and a surrenderee on admittance may maintain an action of trespass for the mesne profits from the time of the surrender,<sup>y</sup> and may devise his interest.

Remedies of  
cestui que  
use.

2. As to the *presentment*: that, by the *general* custom <sup>2. Presentment.</sup> of manors, was to be made at the next court baron immediately after the surrender: but by *special* custom in some places it was good, though made at the second or other subsequent court. And it was to be brought into court by the *same* persons that took the surrender, and then to be presented by the homage; and in all points material must have corresponded with the true tenor of the surrender itself. And therefore, if the surrender were conditional, and the presentment were absolute, both the surrender, presentment, and admittance thereupon, were wholly void:<sup>z</sup> the surrender, as being never truly presented; the

<sup>1</sup> *Sed quare*, as the surrenderor is a trustee for the surrenderee, until the latter is admitted, 1 T. R. 600; 5 Burr. 2764.

<sup>a</sup> But see *contra*, Watk. Gilb. Ten. 163, 275, 281, 457.

<sup>w</sup> 2 Roll. Rep. 107. See *Rex v. Hexham*, 1 Nev. & P. 58.

<sup>x</sup> Co. Copyh. s. 39.

<sup>y</sup> 1 T. R. 600.

<sup>z</sup> Co. Copyh. 40.

presentment, as being false ; and the admittance, as being founded on such untrue presentment. If a man surrendered out of court, and died before presentment, and presentment were made after his death, according to the custom, this was sufficient.<sup>a</sup> So, too, if *cestui que use* died before presentment, yet, upon presentment made after his death, his heir according to the custom was admitted. The same law was, if those, into whose hands the surrender was made, died before presentment ; for upon sufficient proof in court that such a surrender was made, the lord would be compelled to admit accordingly. And if the steward, the tenant, or others into whose hands such surrender is made, refused or neglected to bring it in to be presented, upon a petition preferred to the lord in his court baron, the party grieved should find remedy. But if the lord would not do him right and justice, he might

[ 370 ] sue both the lord, and them that took the surrender, in chancery, and there find relief.<sup>b</sup> However this ceremony of presentment and the various distinctions concerning it are now to a great extent unimportant, it being enacted by stat. 4 & 5 Vict. c. 35, s. 9, that after the 31st of December, 1841, it shall not be essential in any case to the validity of the admittance of any person as tenant, that a presentment shall be made by the homage. Presentment is now accordingly rarely or ever made.

### 3. Admittance.

3. Admittance is the last stage, or perfection, of copyhold assurances. And this is of three sorts : first, an admittance upon a voluntary grant from the lord ; secondly, an admittance upon surrender by the former tenant ; and thirdly, an admittance upon a descent from the ancestor.

### Upon a voluntary grant.

In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For, though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein ; and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord ; yet if he will still continue to dispose of

<sup>a</sup> Co. Litt. 62.

<sup>b</sup> Co. Copy. s. 40.

them as copyhold, he is bound to observe the ancient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For, if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the ancient rent, nor make any the minutest variation in other respects;<sup>c</sup> nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord.<sup>d</sup> But he may grant it for a less estate.<sup>e</sup>

In admittances upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument: and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender.<sup>f</sup>

Upon surrender of another.

And, as in admittances upon surrenders, so in admittances upon *descents* by the death of the ancestor, the lord is used as a mere instrument; and as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial, acts, which every lord in possession is bound to perform.<sup>g</sup>

Upon descents.

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Admittances, however, upon surrender differ from admittances upon descent in this: that by surrender nothing is vested in *cestui que use* before admittance, no more than in voluntary admittances; but upon descent the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action

In what admittances on surrender differ from admittances on descents.

<sup>c</sup> Co. Copyh. s. 41. *Doe d. Rogers v. Strickland*, 2 G. & D. 278.

<sup>d</sup> 8 Rep. 63.

<sup>e</sup> Co. Litt. 52 b.

<sup>f</sup> 4 Rep. 27; Co. Litt. 59.

<sup>g</sup> 4 Rep. 27; 1 Rep. 140.

Fines on  
copyholds,  
rules as to.

[ 372 ]

in the lord's court as tenant; but to most intents the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits, or devise the land;<sup>h</sup> may punish any trespass done upon the ground;<sup>i</sup> nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing the heir's title. Hence indeed an observation might arise, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court: and so the lord may be defrauded of his fine. But to this we may reply in the words of Sir Edward Coke,<sup>h</sup> "I assure myself, if it were in the election of the heir to be admitted or not to be admitted, he would be best contented without admittance; but the custom in every manor is in this point compulsory. For, either upon pain of forfeiture of their copyhold, or of incurring some great penalty, the heirs of copyholders are enforced, in every manor, to come into court and be admitted according to the custom, within a short time after notice given of their ancestor's decease." And by the statute 1 Will. IV., c. 65, (re-enacting, in part, the 9 Geo. I., c. 29,) s. 3, it is enacted, that infants, feme coverts, and lunatics may be admitted to copyhold estates by their guardian, committee, or attorney; and femes coverts and infants who have no guardian may appoint attorneys for that purpose (s. 4); and in default of appearance the lord may appoint an attorney (s. 5); and if the proper fines are not paid, the lord may enter and receive the profits of the copyhold lands till he is satisfied (s. 6).

Improve-  
ment of the  
copyhold  
tenure.

By a very recent statute, to which we have already had occasion to advert,<sup>1</sup> some important improvements

<sup>h</sup> 1 Vict. c. 26, s. 3.

<sup>i</sup> 4 Rep. 23.

<sup>k</sup> Co. Copyh. s. 41.

<sup>1</sup> 4 & 5 Vict. c. 35. See *ante*, p. 179.

are made in the copyholder's tenure. By the law previously in force, the presence of two homagers was essential to the legal character of a customary court, although acts which could be performed by the lord or steward, without the form and machinery of a court, would not be invalidated by being performed at a court rendered void by the presence of one copyhold tenant only, or by being held out of the manor.<sup>m</sup> By stat. 86, however, lords of manors or their stewards may, after the 31st of Dec., 1841, hold customary courts, although no copyhold tenant be present. By the former law an admittance by the lord out of court, and even out of the manor, is good;<sup>n</sup> but a steward as such, and without a special authority from the lord, could not grant an admittance to a copyhold out of the manor.<sup>o</sup> By s. 87 of the present act, lords or their stewards may after the 31st of Dec., 1841, make out of the manor and out of court grants of land held by copy of court roll; and by s. 88, lords or their stewards may after the same period grant admissions out of the manor and out of court. Under these clauses, therefore, stewards may hold courts for the purpose of making grants and granting admissions in any place they please. By virtue of the next section, (s. 89,) after the same period, any surrender and deed of surrender delivered to the lord or steward, and every fact proved to the lord or steward at any court whereat a homage shall not be assembled, shall be forthwith entered on the court rolls.

<sup>m</sup> *Doe d. Leach v. Whittaker*, 5 B. & Ald. 409. 3 R. P. Rep. 20.

<sup>n</sup> Co. Litt. 61 b. *Melwick's case*, 4 Co. 26 b.

<sup>o</sup> *Doe d. Whittaker*, *ubi sup.*

## CHAPTER THE TWENTY-FIFTH.

[ 373 ]

## OF ALIENATION BY DEVISE.

Difference  
between wills  
and testa-  
ments.

THE last method of conveying real property, is by *devise*, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquities of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

History of  
the right to  
devise lands  
before the  
conquest.

It seems sufficiently clear, that, before the conquest, lands were devisable by will.<sup>a</sup> But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord.<sup>b</sup> And some have questioned, whether this restraint (which we may trace even from the ancient Germans<sup>c</sup>) was not founded upon truer principles of policy than the power of wantonly disinheriting the heir by will and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neigh-

[ 374 ] bour: since it rarely happens that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality and preventing the accumulation of estates. But when Solon<sup>d</sup> made a slight alteration, by permitting them (though only

<sup>a</sup> Wright of Tenures, 172.

<sup>b</sup> See page 59.

<sup>c</sup> Tacit. de mor. Germ. c. 21.

<sup>d</sup> Plutarch, in vita Solon.

on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others; which by a natural progression, first produced popular tumults and dissensions: and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses, (which are the natural consequence of free agency, when coupled with human infirmity,) to debar the owner of lands from distributing them after his death, as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

However this be, we find that, by the common law of England since the Conquest, no estate greater than for a term of years, could be disposed of by testament;<sup>a</sup> except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities, by special indulgence, subsisted.<sup>f</sup> And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition of the testator in *extremis*, which made such devises suspicious.<sup>g</sup> Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began

What devises could be made by the common law.

[ 375 ]

Devises were first made of uses.

<sup>a</sup> 2 Inst. 7.

<sup>f</sup> Litt. s. 167; 1 Inst. 111.

<sup>g</sup> Glanv. l. 7, c. 1.

to be devised very frequently,<sup>b</sup> and the devisee of the use could in Chancery compel its execution. For it is observed by Gilbert,<sup>i</sup> that, as the popish clergy then generally sate in the court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses<sup>k</sup> had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz. 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5, which enacted, that all persons being seised in fee-simple (except feme covert, infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage; which now, through the alteration of tenures by the statute of Charles the Second,<sup>l</sup> amounts to the whole of their landed property, except their copyhold tenements. And this exception was first eluded by surrendering the copyholds to the use of the will, and then after the death of the surrenderor his devisee was admitted, but now a direct devise of copyholds is good, without any such surrender to the use of the will.<sup>m</sup>

Statute of  
wills, 32  
Hen. VIII.  
c. 1.

What de-  
vises to cor-  
porations are  
valid.

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain; but by construction of the statute 43 Eliz. c. 4, it has been held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment*, rather than of a *bequest*.

[ 376 ] And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses;<sup>n</sup> it being held that the statute of Elizabeth, which favours appointments to charities, supersedes and repeals all former

<sup>b</sup> Plowd. 414.

<sup>i</sup> On Devises, 7.

<sup>k</sup> 27 Hen. 8, c. 10. See Dyer,

<sup>l</sup> See *ante*, p. 79.

<sup>m</sup> See *post*, p. 430.

<sup>n</sup> Ch. Proc. 272.



statutes;<sup>o</sup> and supplies all defects of assurances:<sup>p</sup> and therefore not only a devise to a corporation, but a devise by a copyhold tenant before the recent statute, and without surrendering to the use of his will,<sup>q</sup> and a devise (nay even a settlement) by tenant in tail without either fine or recovery, before those assurances were abolished, if made to a charitable use, were good by way of appointment.<sup>r</sup> But as copyholds have been held to be within the terms of the statute 9 Geo. 2, c. 36,<sup>s</sup> devises of them to charitable uses, as well as all other interests in lands, must be made conformably to its provisions.<sup>t</sup>

With regard to devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were allowed to be good wills within the statute.<sup>u</sup> To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3, directed that all devises of lands and tenements should not only be in writing, but signed by the testator or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a solemnity nearly similar was requisite for revoking a devise by writing; though the same might be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent: as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arose from marriage and the birth of a child.<sup>v</sup>

Frauds  
under the  
Statute of  
Wills.

Statute of  
Frauds, 29  
Car. II. c. 3.

<sup>o</sup> Gilb. Rep. 45; 1 P. Wms. 248.

<sup>p</sup> Duke's Charit. Uses, 84.

<sup>q</sup> Moor. 890.

<sup>r</sup> 2 Vern. 453; Ch. Prec. 16.

<sup>s</sup> *Ante*, p. 319.

<sup>t</sup> Scriv. on Copyh. 248.

<sup>u</sup> Dyer, 72; Cro. Eliz. 100.

<sup>v</sup> *Christopher v. Christopher*, Scacch. 6 July 1771; *Spragge v. Stone*, at the Cockpit, 27 Mar. 1773. By Wilnot De Grey and Parker.

Construction  
of the Sta-  
tutes of  
Frauds as to  
wills.

[ 377 ]

In the construction of this last statute, it was adjudged that the testator's name, written with his own hand at the beginning of his will, as, "I John Mills do make this my last will and testament," was a sufficient signing, without any name at the bottom;<sup>2</sup> though the other was the safer way. It was also determined, that though the witnesses must all have seen the testator sign, or at least acknowledge the signing, yet they might do it at different times.<sup>7</sup> But they must all have subscribed their names as witnesses in his presence, lest by any possibility they should mistake the instrument.<sup>2</sup> And in one case determined by the Court of King's Bench,<sup>8</sup> the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination however alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For if the will was attested by a servant to whom wages were due, by the apothecary or attorney, whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness,) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, was held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of cre-

<sup>2</sup> 3 Lev. 1.

<sup>2</sup> 1 P. Wms. 740.

<sup>7</sup> Freem. 486; 2 Ch. Cas. 109; Pr.

<sup>8</sup> Stra. 1253.

Ch. 185.

*ditors*, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will should be contested. And in a much later case<sup>b</sup> the testimony of three witnesses, who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient. Much difference of opinion existed as to whether this statute of George the Second extended to all wills, or related merely to wills of real estate only.<sup>c</sup> [ 378 ]

These and other doubts and difficulties sprung up on the construction of the statute of wills, and the statute of frauds, and other statutes passed to amend them. An act has therefore been recently passed, which repeals<sup>d</sup> all former acts and portions of acts relating to wills, and has rendered the law on this subject clear and uniform. This has been effected by statute 1 Vict. c. 26; but in order to understand more clearly its provisions, it may be useful to endeavour to state how the law stood before it came into operation, and its precise effect on that law; and it is to be observed, that the late statute does not extend to any will executed before the 1st of January, 1838.

By the former law all freeholds might be devised except estates held in joint-tenancy, or by entireties, or for an estate-tail, or an estate in *quasi* entail. No alteration is made by the present act as to these estates. The joint tenant cannot sever the joint estate by his will:<sup>e</sup> if he wishes to dispose of it, he must still sever it by deed in his lifetime, and he may then devise his share. Neither can a tenant in tail bar the entail by will. He is expressly precluded from doing so by the act for abolishing fines and recoveries;<sup>f</sup> and no alteration is made as to this by the present act, he may however acquire a fee by a deed enrolled under that act, and may then devise such estate in fee. But with these two exceptions, every species of property will be devisable under the first section of the

Statute of Wills, 1 Vict. c. 26.

How freeholds may be devised.

<sup>b</sup> M. 31 Geo. 2; 4 Bur. 1, 480.

<sup>d</sup> 1 Vict. c. 26, s. 1.

<sup>c</sup> *Lees v. Summerhill*, 17 Ves. 508;  
*Foster v. Banbury*, 3 Sim. 40.

<sup>e</sup> See *ante*, p. 222.

<sup>f</sup> 3 & 4 W. 4, c. 74, s. 40.

**Copyholds.** recent act. Copyholds, as we have already said, were not devisable at common law, and there must have been a surrender to the use of the will, which alone gave effect to the limitations therein; but the necessity of a surrender to the use of a will was taken away by the stat. 55 G. III. c. 192, which enacted that devises should be good without any surrender to the use of the will, and that the same duties and fees should continue to be paid as had been paid on surrenders. But difficulties arose under this act, as to whether it applied to cases where there was no custom in the manor to devise or surrender to the use of a will; and it left untouched any custom that a copyhold surrendered to the use of a will should not pass thereby.<sup>a</sup> By the recent act, the 55 G. III. c. 192, is repealed; and it is enacted that customary freeholds and copyholds may be disposed of by will, notwithstanding there has been no surrender to the use of the will, and "notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will," and "notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or other special custom." The 4th section regulates the payment of the fees and fines payable by devisees of the customary and copyhold estates; and the 5th enacts, that wills or extracts of wills of customary freeholds and copyholds shall be entered on the court rolls, and the lord shall be entitled to the same fine where such estates are not now devisable, as he would have from the heir in case of a descent. By the 29th Car. II. c. 3, s. 12, estates *pur autre vie* might be devised, but it was doubtful whether it extended to estates *pur autre vie* devisable by custom: this section is now repealed, and it is expressly provided that estates *pur autre vie* may be devised, "whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or incorporeal hereditament."<sup>b</sup> It

**Estates pur autre vie.**

<sup>a</sup> *Pike v. White*, 3 Bro. C. C. 117;      <sup>b</sup> See s. 34 of the act.  
*Church v. Mundy*, 15 Ves. 404.

was settled by the more recent cases, that contingent and executory interests might be devised;<sup>1</sup> but the older authorities were to the contrary.<sup>k</sup> The point is placed beyond dispute by the present act, which enacts that all contingent interests may be devised (s. 1). Contingent interests.

A right of entry could not under the former law be devised.<sup>l</sup> By the present act (s. 1), this rule is altered, and all rights of entry may now be devised. No rule of the former law was better settled than that a devise of real estate operated only upon land of which the testator was seised at the time of making his will.<sup>m</sup> This rule is altered by the present act, and under it (s. 1), property acquired after the execution of the will may be devised. So much as to the property which may now be devised. Right of entry.  
What land will operate upon.

The next alteration made by the recent statute affecting the present subject, was as to the execution of a devise of lands.<sup>n</sup>

As the law stood before the act, a great variety of rules existed as to the execution of a will, according to the property devised or bequeathed by it. To pass freeholds, the will must have been in writing, and signed and attested by three witnesses, according to the provisions of the Statute of Frauds; but leaseholds and other personal property might have been bequeathed by any writing, however informal, and unattested; or such property might have passed by parol in certain cases, with the evidence required by the statute. To pass money in the funds by direct legal devise, the will must have been attested by two witnesses, under 1 G. 1, st. 2, c. 19, s. 12, although according to the construction which that act received, it was in fact nugatory. Copyholds might have been devised by an unattested will; but to appoint a guardian, the will must have been attested by two witnesses,<sup>n</sup> and several other minor differences existed. By the late act, one settled rule is established, applicable to every species of wills, it being enacted that no will shall be valid unless it Execution of wills.

<sup>1</sup> *Moor v. Hawkins*, cit. 1 H. B. 33; *Jones v. Roe*, 3 T. R. 88.

<sup>k</sup> *Bishop v. Fontaine*, 3 Lev. 427; *Fearne. Cont. Rem.* 291.

<sup>l</sup> *Baker v. Facking*, Cro. Car. 387,

405; *Goodright v. Forrester*, 8 East, 564; *Cave v. Holford*, 3 Ves. 669.

<sup>m</sup> 1 P. Wms. 575; 11 Mod. 148.

<sup>n</sup> 12 Car. 2, c. 24, s. 18.

shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. And by s. 12, every will executed in manner hereinbefore required shall be valid without any other publication thereof: by s. 14, if any person who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness, to prove the execution thereof, such will shall not on that account be invalid: by s. 15, gifts to an attesting witness are made void; by s. 16, a creditor attesting, shall be admitted a witness: and by s. 17, an executor shall be admitted a witness.

As to revocation of a will.

Another alteration by the recent act is as to the revocation of a will. The will of a man was not revoked by marriage *alone*, or by the birth of a child *alone*;<sup>o</sup> but the will of a single woman was revoked by her marriage *alone*.<sup>p</sup> By the present act it is enacted, that all wills shall be revoked by marriage *alone*; but no will shall be revoked by presumption (s. 19); and no will is to be revoked but by another will or codocil, or by a writing executed like a will, or by destruction (s. 20). These two last sections settle many doubts which have arisen as to the question of revocation.<sup>q</sup> By s. 21, no alteration in a will shall have any effect, unless executed as a will. By s. 22, no will revoked, shall be revived otherwise than by a re-execution, or a codicil to revive it: and by s. 23, a devise shall not be rendered inoperative by any subsequent conveyance or act.

When a will speaks.

As the law stood before the act, although a will was a future disposition, revocable by the testator, and it was not completed, and could pass no estate until after his

<sup>o</sup> *Sullivan v. Sullivan*, 1 Phillim. 348; *Emerson v. Boville*, *Ibid.*

<sup>p</sup> *Doe v. Staple*, 2 T. R. 696; *Long v. Aldred*, 3 Add. 48.

<sup>q</sup> The cases as to these doubts are collected in the Fourth Report of the R. P. Commissioners.

death, yet it could affect no freehold estate but such as he was entitled to at the time of making his will. Therefore if he devised all such estates as should belong to him at the time of his death, the devise was inoperative with respect to any lands he might acquire subsequently to the date of his will. Copyholds also did not pass by a will, if they were acquired after the date of it; but they might have been surrendered to the use of a prior will; in which case the surrender amounted to a republication of the will, and made it speak as from the date of the surrender. But with respect to personal estate a will spoke from the death of the testator. By s. 24 a will shall in all cases be construed to speak from the death of the testator. These are the principal provisions of the act relating to devises: there are some minor points which will hereafter be noticed. On the whole, this important measure, although it may be attended with hardship in some particular cases, especially at first, is entitled to approbation as establishing clear and simple rules for the guidance of those who may wish to dispose of their property by will.

An inconvenience was found to attend the method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir* provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14, provided, that all wills, and testaments, limitations, dispositions and appointments of real estates, by tenants in fee-simple or having power to dispose by will, should (as against such creditors only) be deemed to be fraudulent and void: and that such creditors might maintain their actions jointly against both the heir and the devisee. This statute was repealed by the 1 W. IV. c. 47, but its provisions were re-enacted and extended to certain cases which were not provided for by the former statute. Thus, under the former act, it was held that an action of covenant for uncertain damages did not lie against a devisee.<sup>r</sup> But by the latter statute (s. 2), a devisee is expressly made liable to an action of covenant. It also enacts (s. 4), that if there be no heir at law, actions may be maintained against the

Remedies  
against de-  
visees.

<sup>r</sup> *Wilson v. Knubley*, 7 East, 128; and see *ante*, p. 356.

devisee alone, and (s. 3), against the devisee of the devisee. And now by stat. 3 & 4 W. IV. c. 104, where any person<sup>1</sup> shall die seised of any real estates, whether freehold or copyhold, the same shall be assets for the payment of his just debts, whether due on simple contract or on specialty, as well against the heir as the devisee.

How a devise is considered, and what it will pass.

A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject; with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law,<sup>2</sup> though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands was merely a species of conveyance, was founded the distinction between such devises and testaments of personal chattels; that the latter operated upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will.<sup>3</sup> Wherefore no after-purchased lands would pass under such devise,<sup>4</sup> unless subsequent [ 379 ] to the purchase or contract,<sup>5</sup> the devisor republished his will.<sup>6</sup> But this difference, as we have already seen,<sup>7</sup> no longer exists.

Rules of construction under 1 Vict. c. 26.

It is proper here to mention that by the recent act certain further rules for the construction of wills are laid down, which are chiefly as follows: By s. 25 a residuary devise shall include estates comprised in lapsed or void devises: by s. 26 a general devise of the testator's land shall include copyhold and leasehold as well as freehold lands: by s. 26 a general gift shall include estates over which the testator has a general power of appointment: and by s. 28 a devise

<sup>1</sup> The lands of *traders* were so liable ever since stat. 47 Geo. 3, st. 2, c. 74, re-enacted and extended by 1 W. 4, c. 47, s. 9.

<sup>2</sup> See page 360.

<sup>3</sup> 1 P. Wms. 575; 11 Mod. 148.

<sup>4</sup> Moor. 255; 11 Mod. 127.

<sup>5</sup> 1 Ch. Cas. 39; 2 Ch. Cas. 144.

<sup>6</sup> Salk. 288.

<sup>7</sup> See *ante*, p. 431.



without any words of limitation, shall be construed to pass the fee.<sup>a</sup>

We have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are,

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit.<sup>b</sup> For the maxims of law are, that "*verba intentioni debent inservire*;" and "*benigne interpretamur chartas propter simplicitatem laicorum*." And therefore the construction must also be *reasonable*, and agreeable to common understanding.<sup>c</sup>

General rules of construction of assurances.

1. According to the intention of the parties.

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*.<sup>d</sup> but that, where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words*; *nam qui hæret in litera, hæret in cortice*. Therefore, by a grant of a remainder a reversion may well pass, and *e converso*.<sup>e</sup> And another maxim of law is, that "*mala grammatica non vitiat chartam*;" neither false English nor bad Latin will destroy a deed.<sup>f</sup> Which perhaps a classical critic may think to be no unnecessary caution.

2. Construction of words.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. "*Nam ex antecedentibus et consequentibus fit optima interpretatio*."<sup>g</sup> And therefore that every part of it, be (if possible) made to take effect; and no word but what may operate in some shape or other.<sup>h</sup> "*Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*."<sup>i</sup>

3. Must be made of the entire deed.

4. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other

4. Must be taken most strongly

<sup>a</sup> The rule before the statute was otherwise. See *ante*, p. 126.

<sup>b</sup> And. 60.

<sup>c</sup> 1 Bulst. 175; Hob. 304.

<sup>d</sup> 2 Saund. 157.

<sup>e</sup> Hob. 27.

<sup>f</sup> 10 Rep. 138; Co. Litt. 223; 2 Show. 334.

<sup>g</sup> 1 Bulst. 101.

<sup>h</sup> 1 P. Wms. 457.

<sup>i</sup> Plowd. 156.

against the  
grantor.

party. "*Verba fortius accipiuntur contra proferentem.*" As, if tenant in fee-simple grants to any one an estate of life generally, it shall be construed an estate for the life of the grantee.<sup>k</sup> For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed-poll; for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him.<sup>l</sup> And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail.<sup>m</sup>

5. Must be  
construed  
according to  
law.

5. That, if the words will bear two senses, one agreeable to, and another against law; that sense be preferred which is most agreeable thereto.<sup>n</sup> As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

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6. When two  
clauses are  
repugnant.

6. That, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected:<sup>o</sup> wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand.<sup>p</sup> Which is owing to the different natures of the two instruments; for the first deed, and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them.<sup>q</sup>

<sup>k</sup> Co. Litt. 42.

<sup>l</sup> *Ibid.* 184.

<sup>m</sup> Bacon's Elem. c. 3.

<sup>n</sup> Co. Litt. 42.

<sup>o</sup> Hardr. 94.

<sup>p</sup> Co. Litt. 112.

<sup>q</sup> Cro. Eliz. 420; 1 Vern. 30.

7. That a devise be most favourably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, which are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance;<sup>r</sup> and an estate-tail without words of procreation.<sup>s</sup> By a will also an estate may pass by mere implication, without any express words to direct its course. As, where a man devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication;<sup>t</sup> for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So also, where a devise is of black-acre to A., and of white-acre to B. in tail, and if they both die without issue, then to C. in fee; here A. and B. have *cross remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C.'s remainder over shall be postponed till the issue of both shall fail.<sup>v</sup> But according to the former rule no such cross remainders were allowed between more than two devisees;<sup>w</sup> however this doctrine is now over-ruled, and the intention of the testator will alone be attended to;<sup>x</sup> and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly *probable*) and not merely *possible* implications.<sup>y</sup> And herein there is no distinction between [ 382 ] the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses,<sup>z</sup> is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

And thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive sub-  
7. Devisees are to follow the intention of the testator.  
Concluding reflections on the law of realproperty.

<sup>r</sup> See pp. 126, 435.

<sup>s</sup> See page 183.

<sup>t</sup> H. 13 Hen. 7, 17; 1 Ventr. 376.

<sup>v</sup> Freem. 484.

<sup>w</sup> Cro. Jac. 655; 1 Vern. 224; 2

Show. 139.

<sup>x</sup> *Doe v. Webb*, 1 Taunt. 234.

<sup>y</sup> Vaugh. 262; see 1 Ves. & B. 466; 2 Lev. 207.

<sup>z</sup> Fitz. 236; 11 Mod. 153.

ject, the doctrine of common assurances : which concludes our observations on the *title* to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them : we have examined the *tenures*, both ancient and modern, whereby those estates have been, and are now, holden, and the doctrine of uses and trusts : and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal *kind* ; and have thus considered the right of real property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, except those of the same feudal origin, in its notions and regulations of landed estates : and which therefore could in this particular be very seldom compared with any other.

[ 383 ] The subject which has thus employed our attention is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time ; the infinite determinations upon points that continually arise, and which have been heaped one upon another, for a course of eight centuries, without any order or method ; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law : these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavour principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers as were before strangers even to the very terms of art, which I have been obliged to make use of : though, whenever those have first oc-

curred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages, which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of Sir Edward Coke: "Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed; for on some other day, in some other place," (or perhaps upon a second perusal of the same,) "his doubts will be probably removed."

\* Prose to 1 Inst.

## CHAPTER THE TWENTY-SIXTH.

[ 384 ]

## OF THINGS PERSONAL.

Things personal, what they are.

UNDER the name of things *personal* are included all sorts of things *moveable*, which may attend a man's person wherever he goes ; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immoveable*, as lands, and houses, and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators ; who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them ; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed in the feudal ages.

How taxed formerly.

Hence it was, that a tax of the *fifteenth, tenth*, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the

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frequent forfeitures inflicted by the common law, of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not a

chapter in Britton or the Mirroir, that can fairly be referred to this head ; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity, and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty : and have adopted a more enlarged and less technical mode of considering the one than the other ; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times ; preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

But things personal, by our law, do not only include things *moveable*, but also something more : the whole of which is comprehended under the general name of *chattels*, which, Sir Edward Coke says,<sup>a</sup> is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla* ; which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all moveables in general. In the *grand coustumier* of Normandy<sup>b</sup> a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a *fief* or *feud* : so that not only goods, but whatever was not a *feud*, were accounted *chattels*. And it is in this latter, more extended, negative sense, that our law adopts it : the idea of goods, or moveables only, [ 386 ] being not sufficiently comprehensive to take in everything that the law considers as a *chattel* interest. For since, as the commentator on the *coustumier*<sup>c</sup> observes, there are two requisites to make a *fief* or *heritage*, duration as to time, and immobility with regard to place : whatever wants either

What things  
personal in-  
clude.

<sup>a</sup> I Inst. 118.

<sup>b</sup> Dufreane, II. 409.

<sup>c</sup> C. 87.

<sup>d</sup> *Il conviendrait qu'il fust non mou-  
vable, et de duree a tousiours.* fol.  
107 a.

of these qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

Chattels are of two kinds; chattels real, and chattels personal.

1. Chattels real.

How distinguished from a freehold estate.

Chattels therefore are distributed by the law into two kinds; chattels *real*, and chattels *personal*.<sup>\*</sup>

1. Chattels *real*, saith Sir Edward Coke,<sup>f</sup> are such as concern, or savour of, the realty; as terms for years of land, wardships in chivalry, (while the military tenures subsisted,) the next presentation to a church, estates by a statute merchant, statute-staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to real estates: of which they have one quality, *viz.* immobility, which denominates them *real*; but want the other, *viz.* a sufficient legal indeterminate duration; and this want it is, that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feudal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII.<sup>g</sup> A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed at the common law<sup>h</sup> by corporal investiture and livery of seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as in estates *per auter vie*, and the determinable freeholds mentioned in a former chapter.<sup>i</sup> And even these, being of an uncertain duration,

\* So too, in the Norman law, *Cateux sont meubles et immeubles: sic comme vrais meubles sont qui transporter se peuvent, et ensuivre le corps; immeubles sont choses qui ne peuvent ensuivre le corps, niestre transportees,*

*et tout ce qui n'est point en heritage.* LL. Will. Nothi, c. 4, apud Dufresne, II. 409.

<sup>f</sup> 1 Inst. 118.

<sup>g</sup> See page 164.

<sup>h</sup> See ante, p. 363.

<sup>i</sup> Page 139.



may by possibility last for the owner's life : for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry expired of course the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. Chattels *personal* are, properly and strictly speaking, things *moveable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household-stuff, money, jewels, corn, garments, and every thing else that can properly be set in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book, having been unavoidably led to consider the nature of chattels real and their incidents, in the former chapters which were employed upon real estates: that [ 388 ] kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property*, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in its order.

2. Chattels personal.

Division of the work.

## CHAPTER THE TWENTY-SEVENTH.

## [ 389 ] OF PROPERTY IN THINGS PERSONAL.

Property in  
chattels per-  
sonal is  
either in pos-  
session or in  
action.

PROPERTY, in chattels personal, may be either in *possession* ; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing : or else it is in *action* ; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

I. Absolute  
possession of  
property.

I. First then of property in *possession absolute* ; which is where a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels ; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like : such also may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it ; or the whole plant itself, when severed from the ground ; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

Inanimate  
things.

Animals.

But with regard to *animals*, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitæ*, and such as are *feræ naturæ* : some being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic, (as horses, kine, sheep, poultry, and the like) a man may have as absolute a property as in any inanimate beings ; be-

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Tame and

cause these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property :<sup>a</sup> in which our law agrees with the laws of France and Holland.<sup>b</sup> The stealing, or forcible abduction, of such property as this, is also felony ; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry.<sup>c</sup> But in animals *feræ naturæ* a man can have no absolute property.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother ; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part<sup>d</sup> in the human species it disallows that maxim. And therefore in the laws of England,<sup>e</sup> as well as Rome,<sup>f</sup> "*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.*" And for this Puffendorf<sup>g</sup> gives a sensible reason ; not only because the male is frequently unknown ; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care : wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets ; which belong equally to the owner of the cock and hen, and shall be divided between them.<sup>h</sup> But here the reasons of the general rule cease, and "*cessante ratione cessat et ipsa lex*:" for the [ 391 ] male is well known by his constant association with the female ; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture than the owner of the other.

II. Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited* or *special* property : which is such as is not in its nature permanent, but may sometimes subsist, and at

The rule  
"partus se-  
quitur ven-  
trem."

<sup>a</sup> 2 Mod. 319.

<sup>b</sup> *Vinn. in Inst.* l. 2, tit. 1, s. 15.

<sup>c</sup> 1 Hal. P. C. 511, 512.

<sup>d</sup> See an exception under the new Poor Law Act, 4 & 5 W. 4, c. 76,

stated Rights of Persons, [458.]

<sup>e</sup> Bro. Abr. tit. *Propertie*, 29.

<sup>f</sup> *Ff.* 6, l. 5.

<sup>g</sup> L. of N. l. 4, c. 7.

<sup>h</sup> 7 Rep. 17.

II. Qualified  
possession of  
property.

In wild  
animals.

other times not subsist. In discussing which subject, I shall in the first place shew, how this species of property may subsist in such animals as are *ferae naturae*, or of a wild nature; and then, how it may subsist in any other things, when under particular circumstances.

First, then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam*, *propter impotentiam*, or *propter privilegium*,

1. *Per in-*  
*dustriam.*

1. A qualified property may subsist in animals *ferae naturae*, *per industriam hominis*; by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as horses, swine, and other cattle; which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity; and are therefore, say they, called *mansueta*, *quasi manui assueta*. But however well this notion may be founded abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, [ 392 ] which it calls *domitae naturae*: and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning.<sup>1</sup> A maxim which is borrowed

<sup>1</sup> Bracton, l. 2, c. 1; 7 Rep. 17.

from the civil law ;<sup>k</sup> “*revertendi animus videntur definere habere tunc, cum revertendi consuetudinem deseruerint.*” The law therefore extends this possession farther than the mere manual occupation ; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property ; for he hath *animus revertendi*. So are my pigeons, that are flying at a distance from their home, (especially of the carrier kind,) and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester : all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them.<sup>l</sup> But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure : or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him :<sup>m</sup> but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *ferae naturae* ; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law.<sup>n</sup> And to the same purpose, not to say in the same words, with the civil [ 393 ] law, speaks Bracton :<sup>o</sup> occupation, that is, hiving or including them, gives the property in bees ; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon ; and therefore if another hives them, he shall be their proprietor : but a swarm, which fly from and out of my hive, are mine so long as I can keep them in my sight, and have power to pursue them ; and in these circumstances no one else is entitled to take them. But it hath been also said,<sup>p</sup> that with us the only ownership in bees is in *ratione soli* ; and the charter of the forest,<sup>q</sup> which

<sup>k</sup> Inst. 2, 1, 15.<sup>l</sup> Finch. L. 177.<sup>m</sup> Crompt. of Courts, 176 ; 7 Rep.

16.

<sup>n</sup> Puff. l. 4, c. 6, s. 5 ; Inst. 2, 1,

14.

<sup>o</sup> L. 2, c. 1, s. 3.<sup>p</sup> Bro. Abr. tit. *Propertie*, 37, cites 48 Edw. 3, 24.<sup>q</sup> 9 Hen. 3, c. 13.

allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

How long  
this qualified  
property,  
per indu-  
striam, lasts.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible : a property, that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again; and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine : and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, provided the thief knew they were reclaimed, as it is to steal tame animals;<sup>q</sup> but not so, according to the common law, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds;<sup>r</sup> because their value is not intrinsic, but depending only on the caprice of the owner : though it was such an invasion of property as might amount to a civil injury, and be redressed by a civil action.<sup>t</sup> But now by statute 7 & 8 Geo. IV. c. 29, s. 31, the stealing of dogs and other beasts and birds, ordinarily kept in a state of confinement, not being the subject of larceny at common law, is made punishable upon conviction before two justices.<sup>u</sup> And to steal a reclaimed hawk is felony both by common law and statute;<sup>w</sup> which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors, the ancient Britons, another species of reclaimed animals, *viz.*, cats, were looked upon as creatures of intrinsic value; and the killing

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<sup>q</sup> 1 Hal. P. C. 512; 1 Hawk. P. C. c. 33.

<sup>r</sup> Lamb. Eiren. 275.

<sup>s</sup> 7 Rep. 18; 3 Inst. 109.

<sup>t</sup> Bro. Abr. tit. *Trespass*, 407.

<sup>u</sup> See *Private Wrongs*, [236].

<sup>w</sup> 1 Hal. P. C. 512; 1 Hawk. P. C. c. 28.

or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture.\* And thus much of qualified property in wild animals, reclaimed *per industriam*.

2. A qualified property may also subsist with relation to animals *ferae naturae*, *ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coney or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires:† but, till then, it is in some cases trespass, and in others, felony, for a stranger to take them away.‡ For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones, if reclaimed and confined: for these cannot through weakness, any more than others through restraint, use their natural liberty and forsake him.

2. Qualified property, *ratione impotentiae*.

3. A man may, lastly, have a qualified property in animals *ferae naturae*, *propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty;§ and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner, in which this privilege is acquired, will be shown in a subsequent chapter. [ 395 ]

3. Qualified property *propter privilegium*.

The qualified property which we have hitherto considered, extends only to animals *ferae naturae*, when either

Other objects of qualified property.

\* "*Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summa cauda suspendatur, capite aream attingente, et in eam grana tritici effundantur, usqueadum summitas caudae tritico co-operiatur.*" Wotton. LL. Wall. l. 3, c. 5, s. 5. An amercement similar to which, Sir Edward

Coke tells us (7 Rep. 18), there anciently was for stealing swans; only suspending them by the beak, instead of the tail.

† *Carta de Forest.* 9 Hen. 3, c. 13.

‡ 7 Rep. 17; Lamb. Eiren. 274.

§ Cro. Car. 554; Mar. 48; 5 Mod. 376; 12 Mod. 144.

reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one abstracts another's ancient windows,<sup>b</sup> corrupts the air of his house or gardens,<sup>c</sup> fouls his water,<sup>d</sup> or unpens and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow,<sup>e</sup> the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

Property may be qualified from the peculiar circumstances of the owner.

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Bailment.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both: and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, imme-

<sup>b</sup> 9 Rep. 58. See 2 & 3 W. 4, c. 71,  
a. 3, and Private Wrongs, ch. 13.  
<sup>c</sup> 9 Rep. 59; Lut. 92.

<sup>d</sup> 9 Rep. 59.  
<sup>e</sup> 1 Leon. 273; Skin. 389.



diately, his possession also.<sup>f</sup> So also in case of goods *Pledge*. pledged or pawned upon condition, either to repay money or otherwise; both the pledger and the pledgee have a qualified, but neither of them an absolute property in them: the pledger's property is conditional, and depends upon the performance of the condition of re-payment, &c.; and so too is that of the pledgee, which depends upon its non-performance.<sup>g</sup> The same may be said of goods distrained for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distrainer, or party distrained upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, but only a mere charge or oversight.<sup>h</sup>

Having thus considered the several divisions of property *Property in action.* in *possession*, which subsists there only, where a man hath both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing, or *chose in action*.<sup>i</sup> Thus money due on bond is a *chose in action*; for a pro- [ 397 ]  
 perty in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose in action*: for though a right to some recompense vests in me, at the time of the damage done, yet what and how large such recom- *Chose in action.*

<sup>f</sup> 1 Roll. Abr. 607.

<sup>g</sup> Cro. Jac. 245.

<sup>h</sup> 3 Inst. 108.

<sup>i</sup> The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad recu-*

*perandum eam actionem habemus.*" (Ff. 41, 1, 52.) And again, "*ex bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutionibus. Nam et hæc in bonis esse videntur.*" (Ff. 50, 16, 49.)

pense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant, and hence it may be collected, that all property in action depends entirely upon contracts, either express or implied;<sup>k</sup> which are the only regular means of acquiring a *chose in action*, and of the nature of which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose in action*; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a property in, and [ 398 ] be as well entitled to, such things in action, as to things in possession.

The time of enjoyment, and number of owners of personal property.<sup>l</sup>

And, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before observed in treating of the property of things real.

As to the time of enjoyment.

First, as to the *time of enjoyment*. By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and

<sup>k</sup> This seems, however, too generally laid down, as the term *chose in action* applies also to the right to re-

cover damages for a *wrong*. See 1 Chitt. Pract. of the Law, 99 n.

chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted:<sup>1</sup> though originally that indulgence was only shown when merely the use of the goods, and not the goods themselves, was given to the first legatee:<sup>m</sup> the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded:<sup>n</sup> and therefore if a man either by deed or will limits his books or furniture to A. for life, with remainder over to B., this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property; and no remainder over shall be permitted on such a limitation.<sup>o</sup> For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate. And the rule as to perpetuities equally applies to personal estate as to real estate;<sup>p</sup> as does also the statute against accumulations, as has been already noticed.<sup>q</sup>

Next, as to the *number of owners*. Things personal may [ 399 ] belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. As to the number of owners. They cannot indeed be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants thereof, and an undivided moiety thereof

<sup>1</sup> 1 Equ. Cas. Abr. 360.

<sup>m</sup> Mar. 106.

<sup>n</sup> 2 Freem. 206.

<sup>o</sup> Mr. J. Coleridge, however, doubts whether this would be valid without

the intervention of trustees.

<sup>p</sup> 1 P. Wms. 290.

<sup>q</sup> See *ante*, p. 208.

<sup>r</sup> See *ante*, p. 210.

may be sold ;' and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements.<sup>a</sup> And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship.<sup>b</sup> So also if £100 be given by will to two or more, *equally to be divided* between them, this makes them tenants in common ;<sup>c</sup> as we have formerly seen,<sup>d</sup> the same words would have done, in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property ; and there shall be no survivorship therein.<sup>e</sup>

<sup>a</sup> *Marson v. Short*, 2 Bing. N. C. 118.

<sup>b</sup> 1 Equ. Cas. Abr. 292.

<sup>c</sup> Page 229.

<sup>d</sup> Litt. s. 212 ; 1 Vern. 217.

<sup>e</sup> 1 Vern. 217 ; Co. Litt. 181.

<sup>f</sup> Litt. s. 321.

## CHAPTER THE TWENTY-EIGHTH.

## OF TITLE TO THINGS PERSONAL BY OCCUPANCY. [ 400 ]

WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy and insolvency. 11. By testament. 12. By administration.

The title to things personal.

And first, a property in goods and chattels may be acquired by *occupancy*: which we have more than once<sup>a</sup> remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations have been introduced and countenanced, in order to transfer and continue that property and possession in things personal which have once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

Title by occupancy.

<sup>a</sup> See p. 3, 8, 302.

1. Any one  
may seize  
such goods as  
belong to an  
alien enemy,

1. Thus in the first place, it hath been said, that anybody may seize to his own use such goods as belong to an alien enemy.<sup>b</sup> For such enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattels, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorised by the public authority of the state, residing in the crown;<sup>c</sup> and to such goods as are brought into this country by the alien enemy, after a declaration of war, without a safe conduct or passport. And therefore it hath been holden,<sup>d</sup> that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seised. It hath also been adjudged, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sun-set puts in his claim of property.<sup>e</sup> Which is agreeable to the law of nations, as understood in the time of Grotius,<sup>f</sup> even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities<sup>g</sup> require, that before the property can be changed, the goods must have been brought into port, and have continued a night *intra præsidia*, in a place of safe custody, so that all hope of recovering them was lost.

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and obtain a  
qualified  
property in  
his person.

And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war;<sup>h</sup> at least till his ransom be paid.<sup>i</sup>

<sup>b</sup> Finch. L. 178.

<sup>c</sup> Freem. 40.

<sup>d</sup> Bro. Abr. tit. *propertie*, 38, Forfeiture, 57.

<sup>e</sup> *Ibid.*

<sup>f</sup> *De j. b. and p. l. 3, c. 6, s. 3.*

<sup>g</sup> Bynkersh. *quæst. jur. publ. l. 4*; Rocc. *de Assur. not. 66.*

<sup>h</sup> Bro. Abr. tit. *propertie*, 18.

<sup>i</sup> We meet with a curious writ of trespass in the register (102) for breaking a man's house, and setting

And this doctrine seems to have been extended to negro-servants,<sup>k</sup> before the abolition of negro-slavery,<sup>l</sup> who were purchased, when captives, of the nations with whom they were at war, and were therefore supposed to continue in some degree the property of their masters who bought them: though, accurately speaking, that property (if it indeed continued) consisted rather in the perpetual *service*, then in the *body or person* of the captive.<sup>m</sup>

2. Thus again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have elsewhere seen,<sup>n</sup> are vested by law in the king, and form a part of the ordinary revenue of the crown. But the finder is bound to restore the property found to the owner if possible; and if he keeps it when the owner may be reasonably ascertained, he will be guilty of larceny.<sup>o</sup>

2. Moveables found on the surface of the earth or sea.

3. Thus too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an ancient window overlooking my neighbour's ground,<sup>p</sup> he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me. If my neighbour makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of

3. The benefit of the elements.

such prisoner at large. "*Quare domum ipsius A. apud W. (in qua idem A. quendam H. Scotum per ipsum A. de guerra captum tanquam prisonem suum, quosque sibi de centum libris, per quas idem H. redemptionem suam cum præfato A. pro vita sua salvanda fecerat satisfactum foret, detinuit) fregit, et ipsum H. cepit et abduxit, vel quo voluit abire permisit, &c.*"

<sup>k</sup> 2 Lev. 201.

<sup>l</sup> 3 & 4 W. 4, c. 73, and see Rights of Persons, 121.

<sup>m</sup> Carth. 396; Ld. Raym. 147; Salk. 667.

<sup>n</sup> Rights of Persons, ch. 8.

<sup>o</sup> See Public Wrongs, p. 262, 2nd edit.

<sup>p</sup> See 2 & 3 W. 4, c. 71, s. 3, and Private Wrongs, ch. 13.

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my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbour's prior mill, or his meadow: for he hath by the first occupancy acquired a property in the current.

4. As to animals *feræ naturæ*.

4. With regard likewise to animals *feræ naturæ*, all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seised them, they become while living his *qualified* property, or, if dead, are *absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury.<sup>a</sup> The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aërial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another; between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.<sup>r</sup>

5. Emblements.

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5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements*, by any *possessor* of the land who hath sown or planted it, whether he be owner of the inheritance, or of a less estate: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attend-

<sup>a</sup> See Public Wrongs, [236].

Wrongs, [174], and *post*, ch. 29.

<sup>r</sup> See further as to game, Public



ing personal chattels. They were devisable by testament before the statute of wills,<sup>a</sup> and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action:<sup>b</sup> and by the statute 11 Geo. II., c. 19, though not by the common law,<sup>c</sup> they may be distrained for rent arrere. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given;<sup>d</sup> and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distrainable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny, before they are severed from the ground.<sup>e</sup>

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement:<sup>f</sup> but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted.<sup>g</sup> And these doctrines are implicitly copied and adopted by our Bracton,<sup>h</sup> and have since been confirmed by many resolutions of the courts.<sup>i</sup> It hath been even held, that if one [ 405 ] takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman.<sup>j</sup>

6. Property arising from accession.

<sup>a</sup> Perk. s. 512.

<sup>f</sup> Inst. 2, 1, 25, 26, 31; Ff. 6, 1, 5.

<sup>b</sup> Bro. Abr. tit. *Emblements*, 21; 5 Rep. 116.

<sup>g</sup> Inst. 2, 1, 25, 34.

<sup>c</sup> 1 Roll. Abr. 666.

<sup>h</sup> L. 2, c. 2 & 3.

<sup>d</sup> P. 142, 166.

<sup>i</sup> Bro. Abr. tit. *Propertie*; 23

Moor. 20; Poph. 38.

<sup>e</sup> 3 Inst. 109. See Public Wrongs

<sup>j</sup> Moor. 214.

7. Confusion  
of goods.

7. But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares.<sup>d</sup> But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost.<sup>e</sup> But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent.<sup>f</sup>

8. Copyright  
in books, &c.

8. There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke,<sup>g</sup> and many others,<sup>h</sup> to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and [ 406 ] any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is

<sup>d</sup> Inst. 2, 1, 27, 28; 1 Vern. 217.

P. C. 513; 2 Vern. 516.

<sup>e</sup> Inst. 2, 1, 28.

<sup>g</sup> On Gov. part 2, ch. 5.

<sup>f</sup> Poph. 38; 2 Bulstr. 325; 1 Hal.

<sup>h</sup> See page 8.

so exhibited; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway; but in case an author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published; yet from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtle and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials:<sup>1</sup> meaning thereby the mechanical operation of writing, for which it directed the scribe to receive satisfaction; for, in works of genius and invention, as in painting on another man's canvass, the same law<sup>2</sup> gave the canvass to the painter. As to any other property in the works of the understanding, the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence,<sup>3</sup> Martial,<sup>4</sup> and Statius.<sup>5</sup> Neither

The Roman law as to this.

[ 407 ]

<sup>1</sup> *Si in chartis membranisque tuis carmen vel historiam vel orationem Titius scriperit, hujus corporis non Titius sed tu dominus esse videris.* Inst. 2, 1, 43. See page 459.

<sup>2</sup> *Ibid.* s. 34.

<sup>3</sup> *Prolog.* in *Eunuch.* 20.

<sup>4</sup> *Epigr.* i. 67, iv. 72, xiii. 3, xiv. 194.

<sup>5</sup> *Juv.* vii. 83.

with us in England hath there been (till very lately) any final<sup>o</sup> determination upon the right of authors at the common law.

Statutes for  
the protec-  
tion of copy-  
right.

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Ann. c. 19, (amended by statute 15 Geo. III. c. 53, and 41 Geo. III. c. 107,) declared that the author and his assigns should have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer*;<sup>p</sup> and also protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himself were living, the right should then return to him for another term of the same duration:—and a similar privilege was extended to the inventors of prints and engravings, for the term of eight-and-twenty years, by the statutes 8 Geo. II. c. 13, and 7 Geo. III. c. 38, besides an action for damages, with double costs, by statute 17 Geo. III. c. 57. And afterwards by the statute 54 Geo. III. c. 156, it was enacted that the author and his assigns should have the sole liberty of printing and reprinting his works, for the term of twenty-eight years, and for the life of the author, if he should then be living; and whoever violated this right, was liable to a special action on the case, with double costs and forfeiture of the pirated edition. And now by stat. 5 & 6 Vict. c. 45, (which was passed after much discussion on the subject) the acts of 8 Ann. 41 Geo. III. and 54 Geo. III., are repealed, and the rights of authors are still further protected, it being enacted that the copyright of any book or part of a book, or sheet of music, map, chart, or plan, which shall be published in the lifetime of its author, shall endure for his natural life, and for seven years longer; or if the seven years shall expire

5 & 6 Vict.  
c. 45.

<sup>o</sup> Since this was first written, it was determined in the case of *Millar v. Taylor*, in *B. R. Pasch.* 9 Geo. 3, 1769, 4 Burr. 2303, that an exclusive and permanent copyright in authors subsisted by the common law. But afterwards in the case of *Donaldson v. Becket*, before the house of lords, 22 Febr. 1774, 4 Burr. 2408, it was held

that no copyright now subsists in authors after the expiration of the several terms created by the statute of queen Anne.

<sup>p</sup> By statute 15 Geo. 3. c. 53, some additional privileges in this respect are granted to the universities, and certain other learned societies.

before the end of forty-two years from the first publication, the copyright shall endure for such period of forty-two years; and that when the work is posthumous, the copyright shall endure for forty-two years from the first publication, and shall be the property of the proprietor of the author's manuscript (s. 3). In cases of subsisting copyright, at the time of the passing of the act, the term was to be extended, except when it belonged to an assignee, for other consideration than natural love and affection, in which case it is to cease at the end of the present term, unless its extension be agreed to between the proprietor and the author, (s. 4). By stat. 17, it is further provided that no person except the proprietor shall import into the British dominions for sale or hire any book first composed within the United Kingdom and printed elsewhere, under the penalty of the forfeiture thereof, and also of £10, and double the value, and such books may be seized by any officer of customs or excise. It is also provided by the act that every book may be registered at Stationers' Hall, and without such registration no action shall be commenced, but such registration or omission is not otherwise essential to the copyright (s. 11). By stat. 3 W. IV. c. 15, and 5 & 6 Vict. c. 45, ss. 20 & 21, the author of any dramatic piece or musical composition or his assigns, shall have as his property the sole liberty of representing it or causing it to be represented for the period of twenty-eight years, and for the life of the author, if he shall then be living; and this right is protected by penalties. By stat. 5 & 6 W. IV. c. 65, lectures are protected from being published without the consent of the authors; and by stat. 38 Geo. III. c. 71, and 54 Geo. III. c. 56, sculpture is also protected.

By stat. 54 G. III. c. 156, eleven copies of every published work were ordered to be gratuitously delivered to the eleven public libraries mentioned in the act. By stat. 6 & 7 W. IV. c. 110, and 5 & 6 Vict. c. 45, ss. 6—8, this part of the act is repealed, and the number is now reduced to five. By stat. 1 & 2 Vict. c. 59, the benefit of international copyright is in certain cases secured, as it empowers her Majesty by order in council, to direct that

authors of books first published in foreign countries, and their assigns, shall have a copyright in such books within her Majesty's dominion.

By stat. 5 & 6 Vict. c. 100, amended by stat. 6 & 7 Vict. c. 57, protection is also given to the copyright of designs for ornamenting articles of manufacture. The term of protection allowed depends on the nature of the article, which are divided by the act into thirteen classes. Designs in articles wholly or chiefly of metal, wood, glass, earthenware, floorcloth, paper-hangings, carpets, shawls of a particular kind, and woven fabrics of a particular kind, are protected for three years; designs in articles of shawls of another kind, in yarn, thread, or warp or woven fabrics of another class, are protected for nine calendar months; and designs in articles of a woven fabric of a third class, and lace, and all other articles of manufacture, are protected for twelve months. These copyrights are protected by penalties, and have already been found of great benefit to the fair and ingenious trader.

Remedy for piracy.

It should be observed, that the most effectual remedy for the protection of copyright is to be found in a court of equity, which will grant an injunction to restrain the piratical work. But copyright must now be registered.<sup>q</sup> If, however, the publication be of such a nature, that the author cannot maintain an action at law, a court of equity will not grant an injunction. A work therefore of an immoral or libellous character has not this protection.<sup>r</sup> The remedy at law is also facilitated by the new copyright act.<sup>s</sup>

Patents.

These parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3, which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held that a temporary property therein becomes vested in the king's patentee;<sup>t</sup> and

<sup>q</sup> See *ante*, p. 463.

<sup>t</sup> 5 & 6 Vict. c. 45, ss. 15, 16.

<sup>r</sup> *Walcot, v. Walker*, 7 Ves: 1;

<sup>s</sup> 1 Vern. 62.

*Southey v. Sherwood*, 2 Mer. 435.

by stat. 5 & 6 W. IV. c. 83, (amended by stat. 2 & 3 Vict. c. 67,) his right may be extended for seven years<sup>a</sup> by the Judicial Committee of the Privy Council, on a proper case being made out.<sup>t</sup>

<sup>a</sup> A bill is now before parliament (1844) for enabling the Judicial Committee to extend this term.

<sup>t</sup> See further as to copyright, *post* p. 468.

## CHAPTER THE TWENTY-NINTH.

## [ 408 ] OF TITLE BY PREROGATIVE, AND FORFEITURE.

Title by prerogative.

A SECOND method of acquiring property in personal chattels is by the *king's prerogative* : whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an ancient grant.

Tributes, taxes, and customs.

Such in the first place are all *tributes, taxes, and customs* ; whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis*, or ancient royal revenue, or whether they be occasionally created by authority of parliament ; of both which species of revenue we have elsewhere treated.\* In these the king acquires and the subject loses a property, the instant they become due : if paid, they are a *chose* in possession ; if unpaid, a *chose* in action. Hither also may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his ancient prerogative, or by particular modern statutes : which revenues created by statute do always assimilate, or take the same nature, with the ancient revenues ; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

[ 409 ]

The king cannot have a joint property.

In these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation ; but where the titles of the king and a subject concur, the king shall have the whole : in like manner as

\* See Rights of Persons, p. [307.]



the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person;<sup>b</sup> but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel;<sup>c</sup> and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt.<sup>d</sup> For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but, where they interfere, his is always preferred to that of another person:<sup>e</sup> from which two principles it is a necessary consequence, that the innocent though unfortunate partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.

This doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure trove, in waifs, in estrays, in royal fish, in swans, and the like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons elsewhere<sup>f</sup> mentioned; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

Inherent  
franchises of  
the crown.

[ 410 ]

<sup>b</sup> See page 207.

<sup>c</sup> Fitzh. Abr. t. *Dette*, 38; Plowd. 243.

<sup>d</sup> Cro. Eliz. 263; Plowd. 323; Finch. Law. 178; 10 Mod. 245.

<sup>e</sup> Co. Litt. 30.

<sup>f</sup> See Rights of Persons, ch. 8.

Prerogative  
copyright.

There is also a kind of prerogative *copyright* subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament, proclamations, and orders of council*. 2. As supreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine service*. 3. He is also said to have a right by purchase to the copies of such *law books, grammars,* and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles combined, the exclusive right of printing the translation of the *bible* is founded.

The right to  
grant vested  
in the crown.

There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *feræ naturæ* as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into an inquiry concerning the original of these franchises, or royalties, on which we touched a [ 411 ] little in a former chapter: <sup>a</sup> the right itself being an incorporeal hereditament, though the fruits and profits of it are of a personal nature.

The history  
of this fran-  
chise.

In the first place then we have already shown, and indeed it cannot be denied, that by the law of nature every man from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *feræ naturæ*, and therefore the property of nobody, but liable to be seised by the first occupant. And so it was held by the imperial law, even so late as Justinian's time: "*feræ igitur bestiæ, et volucres, et omnia animalia quæ mari, cælo, et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur.*" <sup>b</sup> But it follows from the very end and consti-

<sup>a</sup> Page 38, 39.

<sup>b</sup> Inst. 2, 1, 12.

tution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the *place* in which this right may or may not be exercised; with respect to the *animals* that are the subject of this right; or with respect to the *persons* allowed or forbidden to exercise it. And in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorise.<sup>1</sup> Many reasons have concurred for making these constitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank; which would be the unavoidable consequence of universal license. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people;<sup>2</sup> which last is a reason oftener meant, than avowed, by the makers of forest or game laws. Nor, certainly in these prohibitions is there any *natural* injustice, as some have weakly enough supposed: since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him. [ 412 ]

Yet however sensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge that, in their present

<sup>1</sup> Puff. L. N. l. 4, c. 6, s. 5.

<sup>2</sup> Warburton's Alliance, 324.

shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi gratia, potest a domino prohiberi ne ingrediatur.*"<sup>k</sup> For if there can, by the law of nature, be any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to *persons* and not to *place*, the pontifical or canon law<sup>l</sup> interdicts "*venationes et sylvaticas vagationes cum canibus et accipitribus,*" to all *clergymen* without distinction; grounded on [ 413 ] a saying of St. Jerom,<sup>m</sup> that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of King Edgar,<sup>n</sup> concur in the same prohibition: though our secular laws, at least after the conquest, did even in the times of popery dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty; as a confirmation whereof we may observe, that it is to this day a branch of the king's prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof.<sup>o</sup>

But, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feudal system: when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present king-

<sup>k</sup> Inst. 2, 1, s. 12.<sup>l</sup> Decretal. l. 5, tit. 24, c. 2.<sup>m</sup> Decret. part 1, dist. 34, l. 1.<sup>n</sup> Cap. 64.<sup>o</sup> 4 Inst. 309.

doms of Europe, on the ruins of the western empire. For when a conquering general came to settle the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the *rustici* or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting; and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions,<sup>p</sup> one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game. This exclusive privilege well [ 414 ] suited the martial genius of the conquering troops, who delighted in a sport<sup>q</sup> which in its pursuit and slaughter bore some resemblance to war. *Vita omnis*, (says Cæsar, speaking of the ancient Germans,) *in venationibus atque in studiis rei militaris constitit.*<sup>r</sup> And Tacitus in like manner observes, that *quoties bella non ineunt, multum venatibus, plus per otium transigunt.*<sup>s</sup> And, indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning than was couched in such rude ditties as were sung at the solemn carousals which succeeded these ancient huntings. And it is remarkable that, in those nations where the feudal policy remains the most uncorrupted, the forest or game laws continue in their highest rigour. In France all game previous to the first Revolution was properly the king's; and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility.<sup>t</sup>

<sup>p</sup> *Feud.* l. 2, tit. 27, s. 5.

<sup>q</sup> In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published A. D. 1205, there is one which prohibits the killing of all game from March to October; that the court and soldiery might find

plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468.)

<sup>r</sup> *De Bell. Gall.* l. 6, c. 20.

<sup>s</sup> C. 15.

<sup>t</sup> *Mattheus de Crimin.* c. 3, tit. 1, Carpsov. *Practic. Saxon.* p. 2, c. 84.

Before the  
conquest.

[ 415 ]

With us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without enclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and desert tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute,\* and of Edward the Confessor:† “*sit quilibet homo dignus venatione sua, in sylva, et in agris, sibi propriis, et in dominio suo: et obstinent omnis homo a venariis regiis, ubicunque pacem eis habere voluerit:*” which indeed was the ancient law of the Scandinavian continent, from whence Canute probably derived it. “*Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum.*”‡

After the  
conquest.

However, upon the Norman conquest, a new doctrine took place: and the right of pursuing and taking all beasts of chase or *venary*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorised under him. And this, as well upon the principles of the feudal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*,

\* C. 77.

† C. 36.

‡ Steinhock *de jure Sueon.* l. 2, c. 8.

and having no other owner, belong to the king by his prerogative. As therefore the former reason was held to vest in the king a *right* to pursue and take them anywhere; the latter was supposed to give the king, and such as he should authorise, a *sole* and *exclusive* right.

This right, thus newly vested in the crown, was exerted with the utmost rigour, at and after the time of the Norman establishment; not only in the ancient forests, but in the new ones which the conqueror made, by laying together vast tracts of country, depopulated for that purpose, and reserved solely for the king's royal diversion; [ 416 ] in which were exercised the most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase: to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, king John laid a total interdict upon the *winged* as well as the *fourfooted* creation: "*capturam avium per totam Angliam interdixit.*"\* The cruel and unsupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feudal rigours and the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de foresta* as warmly contended for and extorted from the king with as much difficulty as those of *magna carta* itself. By this charter, confirmed in parliament,<sup>7</sup> many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly<sup>8</sup> killing the king's deer was made no longer a capital offence, but only punished by a fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

The forest laws established.

*Carta de foresta.*  
9 Hen. III.

But, as the king reserved to himself the *forests* for his own exclusive diversion, so he granted out from time to time other tracts of lands to his subjects under the names of *chases* or *parks*,<sup>9</sup> or gave them licence to make such in

Chases or parks, granted by the crown.

\* M. Paris, 303.

<sup>7</sup> 9 Hen. 3.

<sup>8</sup> Cap. 10.

<sup>9</sup> See page 39.

their own grounds ; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws : and by the common law no person is at liberty to take or kill any beasts of chase, but such as hath an ancient chase or park ; unless they be also beasts of prey.

- [ 417 ] As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise or royalty, derived likewise from the crown, and called *free warren* ; a word, which signifies preservation or custody : as the exclusive liberty of taking and killing fish in a public stream or river is called a *free fishery* ; of which however no new franchise can at present be granted, by the express provision of *magna carta*, c. 16.<sup>b</sup> The principal intention of granting to any one these franchises or liberties was in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And no man until very recently, but he who had a chase or free warren by grant from the crown, or prescription which supposed one, could justify hunting or sporting upon another man's soil ; nor indeed, in thorough strictness of common law, either hunting or sporting at all.

Who were  
qualified by  
the common  
law to kill  
game.

However novel this doctrine may seem to such as have called themselves *qualified* sportsmen, it is a regular consequence from what has been before delivered ; that the sole right of taking and destroying game belongs exclusively to the king. This appears, as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them ; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that, by the acquiescence of the crown, the frequent grants of free warren in ancient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered ; every man, that is exempted from these modern penalties, looking upon himself as at liberty to do what

<sup>b</sup> *Mirr.* c. 5, s. 2. See page 40.



he pleases with the game; whereas the contrary is strictly true, that no man, however well *qualified* he might vulgarly have been esteemed, had a right to encroach on the royal prerogative by the killing of game, unless he could shew a particular grant of free warren; or a prescription, which presumed a grant; or some authority under an act of parliament. As for the latter, I recollect but two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. c. 27, altered by 7 Jac. I. c. 11, and virtually repealed by 22 & 23 Car. II. c. 25, which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40*l.* *per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* personal estate, (and their servants) to take partridges and pheasants upon their own or their master's free warren, inheritance, or freehold: the other by 5 Ann. c. 14, which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady; which with some alteration still subsists,<sup>c</sup> and plainly supposes such power not to have been in them before. The truth of the matter is, that these game laws never did indeed *qualify* anybody, except in the instance of a gamekeeper, to kill game: but only, to save the trouble and formal process of an action by the person injured, who perhaps too might remit the offence, these statutes inflicted *additional* penalties, to be recovered either in a regular or summary way, by any of the king's subjects from certain persons of inferior rank who might be found, offending in this particular. But it does not follow that persons, excused from these additional penalties, were therefore *authorized* to kill game. The circumstance of having 100*l.* *per annum*, and the rest, were not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, were not only liable to actions of trespass by the owners of the land; but also, if they killed game within the limits of any royal franchise, they were liable to the actions of such who might have the right of chase or free warren therein. And now the necessity of any qualification whatever has

<sup>c</sup> 1 & 2 W. 4, c. 32, s. 13.

been recently abolished by statute 1 & 2 Will. IV., and it is enacted (s. 6), that every certificated person may kill game subject to the law of trespass; but the act is not to prejudice any rights of manor, forest, chase, or warren (s. 8); nor the forest rights of the crown (s. 9).

[ 419 ]

Who may  
acquire pro-  
perty in  
game.

Upon the whole it appears, that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, free warren, or free-fishery, are the *only* persons who may acquire any property, however fugitive and transitory, in these animals *feræ naturæ*, while living; which is said to be vested in them, as was observed in a former chapter, *propter privilegium*. And it must also be remembered, that such persons as may thus lawfully hunt, fish, or fowl, *ratione privilegii*, have (as has been said) only a qualified property in these animals: it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It is held, indeed, that if a man starts any game within his own grounds, and follows into another's, and kills it there, the property remains in himself.<sup>d</sup> And this is grounded on reason and natural justice: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so, if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege,<sup>e</sup> and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there;<sup>f</sup> this property arising *ratione soli*. Whereas if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started

<sup>d</sup> 11 Mod. 75.

<sup>e</sup> Puff. L. N. l. 4, c. 6.

<sup>f</sup> Lord Raym. 251.

<sup>g</sup> *Ibid.*

and killed it,<sup>b</sup> though guilty of a trespass against both the owners. By the statute to which we have already adverted, 1 & 2 W. IV. c. 32, the sale of game is legalized under certain restrictions.

III. I proceed now to a third method, whereby a title [ 420 ] to goods and chattels may be acquired and lost, viz. by *forfeiture*; as a punishment for some crime or misdemeanour in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter.<sup>i</sup> It remains therefore in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture.

III. Title by forfeiture.

In the variety of penal laws with which the subject is at present incumbered, it were a tedious and impracticable task to reckon up the various forfeitures inflicted by special statutes, for particular crimes and misdemeanors: some of which are *mala in se*, or offences against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land: such as was the forfeiture of 40s. per month by the statute 5 Eliz. c. 4, for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10l. by 9 Ann. c. 23, for printing an almanack without a stamp, both of which statutes are now however repealed. I shall therefore confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited; referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a

<sup>b</sup> Far. 18; Lord Raym. 251.

<sup>i</sup> See page 313.

<sup>j</sup> 54 Geo. 3, c. 96; 55 Geo. 3, c. 184.

[ 421 ] moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely that by a bankrupt who is guilty of felony by concealing his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

For what offences goods and chattels are forfeited,

Goods and chattels then are totally forfeited by conviction of *high treason* or *misprision* of treason; of *felony* in general, and particularly of *felony de se*, and of *manslaughter*; nay even by conviction of *excusable homicide*;<sup>\*</sup> by *outlawry* for treason or felony; by conviction of *larceny*; by *flight* in treason or felony; even though the party be acquitted of the fact, by *standing mute*, when arraigned of felony; by *drawing a weapon on a judge*, or *striking any one in the presence of the king's courts*; by *præmunire*; by *pretended prophecies*, upon a second conviction; and by *challenging to fight* on account of money won at gaming. All these offences, as will more fully appear elsewhere,<sup>1</sup> induce a total forfeiture of goods and chattels.

and when it commences.

And this forfeiture commences from the time of conviction, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to effect them by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

<sup>\*</sup> Co. Litt. 391; 2 Inst. 316; 3 Inst. 320.

<sup>1</sup> See Public Wrongs. Blackstone mentions certain offences as causing forfeiture, which no longer exist, as *petit treason*, which is now made felony only, 9 G. 4, c. 81; *outing*,

which was removed from our statute book by stat. 5 Geo. 4, c. 47; and the residing abroad of artificers, which is no longer punishable, 5 Geo. 4, c. 97. See Public Wrongs, pp. [154], [160].

## CHAPTER THE THIRTIETH.

## OF TITLE BY CUSTOM.

[ 422 ]

A FOURTH method of acquiring property in things personal, or chattels, is by *custom* ; whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless, should I attempt to enumerate all the several kinds of special customs which may entitle a man to a chattel interest in different parts of the kingdom. I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern ; viz. *heriots*, *mortuaries*, and *heir-looms*. Title by custom.

1. Heriots, which were slightly touched upon in a former chapter,<sup>a</sup> are usually divided into two sorts, *heriot-service*, and *heriot-custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent:<sup>b</sup> the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom.<sup>c</sup> Of these therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land. They may also be due by the custom of the manor on the alienation of the tenant.<sup>d</sup> 1. Heriots.

The first establishment, if not introduction, of compulsory heriots into England, was by the Danes: and we find in the laws of King Canute<sup>e</sup> the several *heregeates* or heriots specified, which were then exacted by the king on the death of divers of his subjects, according to their respective dignities: from the highest *eorls* down to the [ 423 ]

<sup>a</sup> Page 100, 176.<sup>b</sup> 2 Saund. 166.<sup>c</sup> Co. Cop. s. 24.<sup>d</sup> 1 Scriv. 481.<sup>e</sup> C. 69.

History of them.

most inferior *thegne* or landholder. These, for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to Sir Henry Spelman,<sup>f</sup> signifies. These were delivered up to the sovereign on the death of the vassal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the Conqueror fashion his law of reliefs, as was formerly observed;<sup>g</sup> when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feudal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money.<sup>h</sup>

Now due  
chiefly in  
copyholds.

[ 424 ]

The Danish compulsive heriots, being thus transmuted into reliefs, underwent the same several vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day, in the shape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary.<sup>i</sup> These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instances where custom has favoured the lord. For this payment was originally, according to Blackstone and the older authorities,<sup>j</sup> a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord: and custom, which has on the one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretionary piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is not unfrequently a copyhold enfranchised, whereupon the heriot is still due by custom. Bracton<sup>k</sup> speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia praeestatio quae nominatur he-*

<sup>f</sup> Of Feuds, c. 18.

<sup>g</sup> Page 67.

<sup>h</sup> LL. Guil. Cong. c. 22, 23, 24.

<sup>i</sup> Lambard. Peramb. of Kent, 492.

<sup>j</sup> This, however, is questioned in the case of *Garland v. Jekyll*, 2 Bing. 292.

<sup>k</sup> L. 2, c. 36, s. 9.

*riettum; ubi tenens, liber vel servus, in morte sua dominum suum, de quo tenuerit, respicit de meliori averio suo, vel ac secundo meliori, secundum diversam locorum consuetudinem.*" And this he adds, "*magis fit de gratia quam de jure;*" in which Fleta<sup>1</sup> and Britton<sup>m</sup> agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant; though now the immemorial usage has established it as of right in the lord.

This heriot is sometimes the best live beast, or *averium*, which the tenant dies possessed of, (which is particularly denominated the villein's relief in the twenty-ninth law of King William the conqueror) sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which, immediately on the death of the tenant who was the owner of it, being ascertained by the option of the lord,<sup>n</sup> becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for she can have no ownership in things personal.<sup>o</sup> In some places there is a customary composition in money, as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably ancient custom; but a new composition of this sort will not bind the representatives of either party: for that amounts to the creation of a new custom, which is now impossible.<sup>p</sup> Where a copyhold tenement holden by heriot custom, becomes the property of several as tenants in common, or is otherwise divided, the lord is entitled to a heriot from each of them, and for each portion of the tenement; but if the several portions become re-united in one person, one heriot only is payable.<sup>q</sup> The real property commissioners have expressed their disapprobation of heriots, and recommended their commutation, which the legislature has recently facilitated.<sup>r</sup>

Of what the heriot consists.

<sup>1</sup> L. 3, c. 18.

<sup>m</sup> C. 69.

*Holloway v. Berkeley*, 6 B. & C. 9.

<sup>n</sup> Hob. 60.

<sup>r</sup> See 4 & 5 Vic. c. 35, am. by 6 & 7

<sup>o</sup> Keilw. 48; Leon. 239.

Vict. c. 23, and *ante*, p. 178, and 1st

<sup>p</sup> Co. Cop. s. 31.

Real Prop. Rep.

<sup>q</sup> *Garland v. Jekyll*, 2 Bing. 273

2. Mortuaries.

[ 425 ]

2. Mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us, from a constitution of archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their life-time might have neglected or forgotten to pay. For this purpose, *after* the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiae suae sine dolo, fraude, seu contradictione, qualibet, pro recompensatione subtractionis decimarum personalium, nec non et oblationum, secundum melius animal reservetur, post obitum, pro salute animae suae.*"<sup>1</sup> And therefore in the laws of king Canute<sup>2</sup> this mortuary is called soul-scot (þaþþœab) or *symbolum animae*. And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandise, jewels, and other moveables.<sup>3</sup> So also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church in case he had made a will. But the parliament, in 1409, redressed this grievance.<sup>4</sup>

[ 426 ] It was anciently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried: and thence<sup>5</sup> it is sometimes called a *corse-present*: a term, which bespeaks it to have been once a voluntary donation. However in Bracton's time, so early as Henry III. we find it rivetted into an established

<sup>1</sup> Co. Litt. 185.

<sup>2</sup> Provinc. l. 1, tit. 8.

<sup>3</sup> C. 13.

<sup>4</sup> Panormitan. *ad Decretal.* l. 3, t. 20, c. 32.

<sup>5</sup> Sp. L. b. 28, c. 41.

<sup>6</sup> Selden. Hist. of Tithes, c. 10.



custom : insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum, fecerit, dominum suum de meliori re quam habuerit recognoscere ; et postea ecclesiam de alia meliori :*" How the custom as to mortuaries stood.

the lord must have the best good left him as an heriot ; and the church the second best as a mortuary. But yet this custom was different in different places : "*in quibusdam locis habet ecclesia melius animal de consuetudine ; in quibusdam secundum, vel tertium melius ; et in quibusdam nihil ; et ideo consideranda est consuetudo loci.*"<sup>r</sup> This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or corse present was due upon the death of every clergyman to the bishop of the diocese ; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the archdeaconry of Chester a custom also prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse, or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring.\* But by statute 28 Geo. II. c. 6, this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature: though Sir Edward Coke<sup>a</sup> apprehends that this is *a duty due upon death*, and not a *mortuary* ; a distinction which seems to be without a difference.<sup>b</sup> For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things; the bishop's best horse or palfrey, with his furniture : his cloak, or gown, and tippet: his cup and cover: his basin [ 427 ]

<sup>r</sup> Bracton, l. 2, c. 26; Flet. l. 2, c. 57.

<sup>a</sup> Cro. Car. 237.

<sup>b</sup> 2 Inst. 491.

<sup>b</sup> But see *Mirehouse v. Rennell*, 8 Bing. 497, as to the correctness of this quotation.

and ewer : his gold ring : and lastly, his *muta canum*, his mew or kennel of hounds ; as was mentioned in the preceding chapter.<sup>c</sup> |||

Mortuaries  
regulated by  
21 Hen. VIII.  
c. 6.

This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other ; it was thought proper by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries, or corse-presents to parsons of any parish, shall be taken in the following manner : unless where by custom less or none at all is due ; *viz.* for every person who does not leave goods to the value of ten marks, nothing : for every person who leaves goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.* ; if above thirty pounds, and under forty pounds, 6*s.* 8*d.* ; if above forty pounds, of what value soever they may be, 10*s.*, and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme covert ; nor for any child ; nor for any one of full age, that is not a house-keeper ; nor for any wayfaring man ; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

2. Heir-  
looms, what  
they are.

3. Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon original ; in which language it signifies a limb or member ;<sup>d</sup> so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold : otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor.<sup>e</sup> But deer in a real [ 428 ] authorised park, fishes in a pond, doves in a dove-house, &c., though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever

<sup>c</sup> Page 470.

<sup>d</sup> Spelm. Gloss. 277.

Co. Litt. 388.

it vests, by either descent or purchase.<sup>f</sup> For this reason also I apprehend it is, that the ancient jewels of the crown are held to be heir-looms:<sup>g</sup> for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor.<sup>h</sup> By special custom also, in some places, carriages, utensils, and other household implements, may be heir-looms;<sup>i</sup> but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab ædibus non facile revelitur,*"<sup>j</sup> is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like.<sup>k</sup> A very similar notion to which prevails in the Duchy of Brabant; where they rank certain things moveable among those of the immoveable kind, calling them by a very particular appellation, *prædia volantia*, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes) "*dignitatem istam nacta sunt, ut villis, sylvis, et ædibus, aliisque prædiis, comparentur; quod solidiora mobilia ipsis ædibus ex destinatione patrisfamilias cohærere videantur, et pro parte ipsarum ædium æstimentur.*"<sup>l</sup>

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of [ 429 ] honour, suited to his degree.<sup>m</sup> In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from

<sup>f</sup> Co. Litt. 8.<sup>g</sup> *Ibid.* 18.<sup>h</sup> Bro. Abr. tit. *Chattels*, 18.<sup>i</sup> Co. Litt. 18, 185.<sup>j</sup> Spelm. *Gloss.* 277.<sup>k</sup> 12 Mod. 520.<sup>l</sup> Stockman's *De Jure Devolutionis*, c. 3, s. 16.<sup>m</sup> *Spooner v. Brewster*, 3 Bing. 138.

the heir.<sup>a</sup> Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to their heir.<sup>o</sup> But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried; although it is now an indictable offence to take up a dead body even for the purpose of dissection.<sup>p</sup> The parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one in taking up a dead body steals the shroud or other apparel, it will be felony;<sup>q</sup> for the property thereof remains in the executor, or whoever was at the charge of the funeral.

A devise of  
heir-looms  
void.

But to return to heir-looms: these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void,<sup>r</sup> even by a tenant in fee-simple. For, though the owner might during his life, have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

<sup>a</sup> 12 Rep. 105; Co. Litt. 18.

<sup>o</sup> 3 Inst. 202; 12 Rep. 105.

<sup>p</sup> 1 Russ. Crim. 415, 2d edit. By  
stat. 2 & 3 W. 4, c. 75, amended by  
4 & 5 W. 4, c. 26, the custody of dead

bodies for the purpose of anatomy is  
provided for and regulated.

<sup>q</sup> 3 Inst. 110; 12 Rep. 113; 1 Hal.  
P. C. 515.

<sup>r</sup> Co. Litt. 185.

## CHAPTER THE THIRTY-FIRST.

OF TITLE BY SUCCESSION, MARRIAGE,  
AND JUDGMENT.

[ 430 ]

In the present chapter we shall take into consideration three other species of title to goods and chattels.

V. The fifth method therefore of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies: and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate.<sup>a</sup> Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists.<sup>b</sup> And thus a lease for years, an obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

Title by succession.

[ 431 ]

But, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or

What sole corporations can take chattels by succession.

<sup>a</sup> 4 Rep. 65.

<sup>b</sup> Bro. Abr. tit. *Estates*, 90; Cro. Eliz. 464.

the dean of some ancient cathedral, who stands in the place of, and represents in his corporate capacity, the chapter; such sole corporations as these have in this respect the same powers, as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative.<sup>c</sup> Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it.<sup>d</sup> For the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be, according to Blackstone,<sup>e</sup> in abeyance

[ 432 ] from the death of the present owner until the successor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner;<sup>f</sup> but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body than subsisting nearly in their own right: the chattel interest therefore, in such a case, is really and substantially vested

<sup>c</sup> Dyer, 48; Cro. Eliz. 464.

<sup>d</sup> Co. Litt. 46.

<sup>e</sup> But see *ante*, p. 125.

<sup>f</sup> Brownl. 132.

in the hospital, convent, chapter, or other aggregate body : though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession.<sup>g</sup>

Yet to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors.<sup>h</sup> The other exception is, where by a *particular* custom, some *particular* corporation sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund ;<sup>i</sup> but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors, for the same purpose ; for the custom extends not to that : nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund ; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule, that such right of succession to chattels is universally inherent by the common law in all aggregate corporations, [ 433 ] in the king, and in such single corporations as represent a number of persons ; and may, by special custom, belong to certain other sole corporations for some particular purposes : although, generally, in sole corporations no such right can exist.

VI. A sixth method of acquiring property in goods and chattels is by *marriage* ; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them.

<sup>g</sup> Co. Litt. 46.

<sup>h</sup> *Ibid.* 90.

<sup>i</sup> 4 Rep. 65 ; Cro. Eliz. 682.

Exceptions  
to the gene-  
ral rule.

Title by mar-  
riage.

What property vests in the husband.

This depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law,<sup>j</sup> so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless by the birth of a child he becomes tenant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.

Chattels real and personal.

[ 434 ]

There is therefore a very considerable difference in the acquisition of this species of property by the husband, according to the subject-matter; viz. whether it be a chattel *real*, or a chattel *personal*; and, of chattels personal, whether it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture:<sup>k</sup> if he be outlawed or attainted, it shall be forfeited to the king;<sup>l</sup> it is liable to execution for his debts:<sup>m</sup> and, if he survives his wife, it is to all intents and purposes his own.<sup>n</sup> Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will:<sup>o</sup> for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chat-

<sup>j</sup> See Rights of Persons, ch. 15.

<sup>k</sup> Co. Litt. 46.

<sup>l</sup> Plowd. 263.

<sup>m</sup> Co. Litt. 351.

<sup>n</sup> *Ibid.* 300.

<sup>o</sup> Poph. 5; Co. Litt. 351.



tels personal (or *choses*) *in action*; as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife; and the assignment of them for a valuable consideration, will be esteemed to be a reduction into possession.<sup>p</sup> But, if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them.<sup>q</sup> And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property: but if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs;<sup>r</sup> for the husband never exerted the right he had, which right determined with the coverture. Thus in both these species of property the law is the same, in case the wife survives the husband; but in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*: for he shall have the *chattel real* by survivorship, but not the *choses in action*;<sup>s</sup> [ 435 ] except in the case of arrears of rent due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right, or by assigning it for a valuable consideration:<sup>t</sup> but

<sup>p</sup> *Borvil v. Brandon*, 1 P. Wms. 458; *Honner v. Morton*, 3 Russ. 69.

<sup>q</sup> Co. Litt. 351.

<sup>r</sup> Co. Litt. 351.

<sup>s</sup> 3 Mod. 186.

<sup>t</sup> See *ante*, n. p.

as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, and as he did not choose to assign it in her lifetime, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture. And since the stat. 29 Car. II. c. 3, s. 25, has given the administration of all the wife's personal property to her husband for his own benefit, even if he dies after her and before he has reduced her *chose in action* into possession, his personal representatives will be entitled to them.<sup>a</sup> But a husband cannot even in his lifetime assign his wife's *reversionary* interest in a *chose in action*, even for a valuable consideration; but if he die before her and before the property falls into possession, the wife will be preferred to the assignee, and the wife is not bound to dispute such assignment until it falls into possession.<sup>b</sup> But a husband may assign his wife's reversionary interest in a chattel real for a valuable consideration.<sup>c</sup>

Thus, and upon these reasons, stands the law between husband and wife, with regard to *chattels real* and *choses in action*: but, as to *chattels personal* (or *choses*) in *possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revert in the wife or her representatives.<sup>d</sup>

Wife's paraphernalia.

[ 436 ] And, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*; which is a term borrowed from the civil law,<sup>e</sup> and is derived from the Greek language, signifying

<sup>a</sup> *Elliott v. Collyer*, 1 Wils. 168.

Bea. 56.

<sup>b</sup> *Hornby v. Lee*, 2 Madd. 16; *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65; *Pierce v. Thornly*, 2 Sim. 167; *Ashton v. M'Dougall*, 5

<sup>c</sup> *Doune v. Hart*, 2 Russ. & M. 361.

<sup>d</sup> Co. Litt. 351.

<sup>e</sup> Pf. 23, §, 9, s. 3.

something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; and therefore even the jewels of a peeress, usually worn by her, have been held to be *paraphernalia*.<sup>a</sup> These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives.<sup>a</sup> Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away.<sup>b</sup> But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets.<sup>c</sup> And her necessary apparel is protected even against the claim of creditors.

It is also to be observed that where previous to, or during the marriage, property is settled either by deed or will for the *separate use* of the wife, she will be entitled thereto exclusively of her husband, and if she is not restrained from anticipation, she may deal with it in equity as if she were a *feme sole*.<sup>a</sup> But if the accumulation from property settled to the separate use of the wife be laid out either for the benefit of the wife, or be retained by her at her death, the husband will be entitled to such accumulation or the articles on which they have been laid out, and this though the husband and wife lived separate.<sup>f</sup>

Property settled to the separate use of the wife.

VII. A judgment, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or ac-

Title by judgment.

<sup>a</sup> Moor. 213.

<sup>a</sup> Cro. Car. 343; 1 Roll. Abr. 911; 2 Leon. 166.

<sup>b</sup> Noy's Max. c. 49; *Grahme v. Lord Londonderry*, 24 Nov. 1746, Canc.

<sup>c</sup> 1 P. Wms. 730.

<sup>d</sup> Noy's Max. c. 49.

<sup>e</sup> *Hulme v. Tenant*, 1 B. C. C. 16; *Jackson v. Hobhouse*, 2 Meriv. 487; *Tullett v. Armstrong*, 1 Beav. 17; confirmed on appeal by L. C.

<sup>f</sup> *Carne v. Brice*, 7 M. & W. 183; *Tugman v. Hopkins*, 5 Scott, N. S. 464; *Semble contra Ledgard v. Garland*, 1 Curt. 286.

tion ; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *choses in action* ; as if a man gives bond for 20*l.*, or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth : in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made ; and the

[ 437 ] law only gives him a remedy to recover the possession of that right, which already in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever till after suit commenced and judgment obtained in a court of law : where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time ; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. Penalties given by statute to be recovered on an action popular.

1. Such penalties as are given by particular statutes, to be recovered on an action *popular* ; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500*l.* which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths to the government :<sup>a</sup> which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A. or B., has any right, claim, or demand, in or upon the penal sum, till after action brought ;<sup>b</sup> for he that brings his action, and can *bonâ fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit ; but it is not consummated till judgment ; for, if any collusion appears, he loses the priority he had gained.<sup>i</sup> But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a

<sup>a</sup> As to these oaths, see Rights of Persons, [368.]

<sup>b</sup> 2 Lev. 141 ; Stra. 1169 ; Combe

v. Pitt, B. R. Tr. 3 Geo. 3.

<sup>i</sup> Stat. 4 Hen. 7, c. 20.

pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty.<sup>k</sup> For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a suit and judgment at law are not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed as it were in a state of nature, accessible by all the king's subjects, but the acquired right of none of them: open therefore to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them. [ 438 ]

2. Another species of property, that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may

<sup>2.</sup> Damages given by a jury.

<sup>k</sup> Cro. Eliz. 138; 11 Rep. 65.

fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

[ 439 ] 3. Hither also may be referred, upon the same principle, all titles to costs and expenses of suit ; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

3. Costs and  
expenses of  
suits.

## CHAPTER THE THIRTY-SECOND.

## OF TITLE BY GIFT, GRANT, AND CONTRACT. [ 440 ]

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*; whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. Gifts then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent: and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twenty-second chapter of the present volume, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in cases of leases, always reserving a rent, though it be but a peppercorn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

Title by gift  
or grant.

*Gift: gratuitous*  
*Grant: for a consideration*

Grants or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires all title and interest therein: which may be done either in writing, or by word of mouth<sup>a</sup> attested by sufficient evidence, of which the delivery of possession is the strongest

How they  
may be  
made.

<sup>a</sup> Perk. s. 57.

and more essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4, all deeds of gift of goods, made in trust to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture: and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5, every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others,<sup>b</sup> shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual; and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.

A gift or grant is accompanied with delivery of possession.

A true and proper gift or grant is generally accompanied with delivery of possession, and takes effect immediately: as if A. gives to B. 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense:<sup>c</sup> unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise. If possession be not delivered, this is strong evidence of fraud, although it is not always conclusive.<sup>d</sup> All goods in the possession of a bankrupt by permission of the true owner, and whereof the bankrupt is the reputed owner, are liable to his creditors.<sup>e</sup> But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man cannot [ 442 ] be compelled to perform, but upon good and sufficient consideration; as we shall see under our next division.

<sup>b</sup> See 3 Rep. 82.

<sup>c</sup> Jenk. 109.

<sup>d</sup> *Picklock v. Lyster*, 3 M. & S. 371.

<sup>e</sup> 6 Geo. 4, c. 16, s. 72.



IX. A contract, which usually conveys an interest <sup>Title by con-</sup> merely in action, is thus defined; "an agreement upon sufficient consideration to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contracts; 1. The *agreement*: 2. The *consideration*: and 3. The *thing* to be done or omitted, or the different species of contracts.

First then it is an *agreement*, a mutual bargain or con- <sup>1. The agree-</sup> vention; and therefore there must at least be two contract- ment. ing parties, of sufficient ability to make a contract: as where A. contracts with B. to pay him 100*l.* and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law: for no *chose in action* could be assigned or granted over,<sup>f</sup> because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the ancient principle, the form of assigning a *chose in action* is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptance a debt or bond is said to be assigned over, it must still be used in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee. But the king is an exception to this general rule; for he might always either grant or receive a *chose in action* by assignment:<sup>g</sup> and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose in action*, as much as the law will that of a *chose in possession*.<sup>h</sup> But the assignee cannot sue for it in equity unless the assignor refuses to allow the assignee to sue for it at law in his name, or has done, or intends to do, some act which will prevent the assignee from recovering it at law in the assignor's name.<sup>i</sup>

<sup>f</sup> Co. Litt. 214.<sup>h</sup> 3 P. Wms. 199.<sup>g</sup> Dyer, 30; Bro. Abr. tit. *Chose in Action*, 1 & 4.<sup>i</sup> *Hammond v. Messenger*, 9 Sim. 327.

[ 443 ] The contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts which runs through and is annexed to all other contracts, conditions, and covenants, viz. that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu*.<sup>k</sup>

or executed  
or executory.

A contract may also be either *executed*, as if A. agrees to change horses with B., and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*: a contract *executory* conveys only a *chose in action*.

II. The con-  
sideration.

Having thus shown the general nature of a contract, we are, secondly, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party to enter into the contract. "It is an agreement, upon *sufficient consideration*." The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual

<sup>k</sup> Inst. 3, 14, 2.

or reciprocal.<sup>1</sup> This thing, which is the price or motive of the contract, we call the consideration : and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen,<sup>m</sup> is that of blood or natural affection between near relations ; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another.<sup>n</sup> This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law ; and, if it be of a sufficient adequate value, is never set aside in equity : for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

Which is  
either good  
or valuable.

These valuable considerations are divided by the civilians<sup>o</sup> into four species. 1. *Do, ut des* : as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment ; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias* : as, when I agree with a man to do his work for him, if he will do mine for me ; or if two persons agree to marry together ; or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other ; as, that in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides ; as, that in consideration that A. will not trade to Lisbon, B. will not trade to Marseilles ; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des* : when a man agrees

Valuable  
considerations  
divided  
into four  
species.

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<sup>1</sup> *In contractibus fere omnibus, sive nominatis sive innominatis, permutatio continetur.* Gravin. l. 2, s. 12. See other civil law authorities, cited 1 Fonbl. Eq. 335—340, where it is

shown that considerable conflict prevails on this point.

<sup>m</sup> Page 349.

<sup>n</sup> 3 Rep. 83.

<sup>o</sup> Pp. 19, 5, 5.

to perform anything for a price, either specially mentioned, or left to the determination of the law to set a value to it. As when a servant hires himself to his master for certain wages or an agreed sum of money : here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally ; for then he is under an implied contract to perform this service, for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias* : which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work : which, we see, is nothing else but the last species inverted ; for *servus facit, ut herus det*, and *herus dat, ut servus faciat*.

Consideration absolutely necessary.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law : and a man cannot be compelled to perform it.<sup>p</sup> As if one man promises to give another £100, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however, a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide ; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for : and therefore our law has adopted<sup>q</sup> the maxim of the civil law,<sup>r</sup> that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude ; nay, even if the thing be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the statute of limitations,) it is no longer *nudum pactum*. And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned,<sup>s</sup> it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary

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<sup>p</sup> Dr. & St. d. 2, c. 24.

<sup>q</sup> Bro. Abr. tit. *Dette*, 79 ; Salk. 129.

<sup>r</sup> Cod. 2, 3, 10, & 5, 14, 1.

<sup>s</sup> Plowd. 308, 309.

bond, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument,<sup>1</sup> carries with it an internal evidence of a good consideration. Courts of justice will therefore support it as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract. And if a man gives a promissory note, he shall not be allowed, as against an indorsee, to aver the want of consideration, in order to evade the payment, but as against the payee of the note he may now plead want of consideration.<sup>2</sup>

We are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing*." 2. The thing agreed to be done or omitted. The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are 1. That of *sale or exchange*. 2. That of *bailment*. 3. That of *hiring and borrowing*. 4. That of *debt*.

1. *Sale or exchange* is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo*.<sup>3</sup> If it be a commutation of goods for goods, it is more properly an *exchange*; but, if it be a transferring of goods for money, it is called a *sale*: which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Macphelah:<sup>4</sup> though the practice of exchange still subsists among several of the savage nations. But, with regard to the *law* of sales and exchanges, [ 447 ] there is no difference. I shall therefore treat of them both

<sup>1</sup> Hardr. 200; 1 Ch. Rep. 157.

*fen v. Roberts*, 1 Esp. 261.

<sup>2</sup> Stra. 674; Bayley on Bills, 69;

<sup>3</sup> Noy's Max. c. 42.

*Barber v. Backhouse*, Peake, 61; Wyl-

<sup>4</sup> Gen. c. 23, v. 16.

under the denomination of sales only; and shall consider their force and effect, in the first place, where the vendor *hath* in himself, and secondly where he *hath not*, the property of the thing sold.

Where the vendor may dispose of his goods.

Where the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner: unless judgment had been obtained against him for a debt or damages, and the writ of execution was actually delivered to the sheriff. For then by the statute of frauds,<sup>7</sup> the sale shall be looked upon as fraudulent, and the property of the goods be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing of the writ,<sup>8</sup> and any subsequent sale was fraudulent; but the law was thus altered in favour of *purchasers*, though it still remains the same between the *parties*: and therefore if a defendant died after the awarding and before the delivery of the writ, his goods were bound by it in the hands of his executors.<sup>9</sup>

The goods cannot be carried away until they are paid for.

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered on the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of his goods as he pleases.<sup>b</sup> But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest* (which the civil law calls *arrha*, and interprets to be "*emptiois-venditionis contractæ argumentum*,"<sup>c</sup>) the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them.<sup>d</sup>

<sup>7</sup> 29 Car. 2, c. 3.

<sup>8</sup> 8 Rep. 171; 1 Mod. 188.

<sup>9</sup> Comb. 33; 12 Mod. 5; 7 Mod.

95. See stat. 1 & 2 Vict. c. 110, and

Private Wrongs, ch. 27.

<sup>b</sup> Hob. 41; Noy's Max. c. 42.

<sup>c</sup> Inst. 3, tit. 24.

<sup>d</sup> Noy, *ibid*.

And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute 29 Car. II. c. 3, s. 17, no contract for the sale of goods to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And, with regard to goods under the value of 10*l.*, no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. And by statute 9 Geo. IV. c. 14, s. 7, it is enacted that the provisions of the 17th section of the statute of frauds, shall extend to all contracts for the sale of goods, of the value of 10*l.* or more, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually ready for delivery. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, "*venditio per mutuum manuum complexionem*;"\* till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on.<sup>f</sup> But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for 10*l.*, and B. pays him earnest, or signs a note in writing of the bargain; and afterwards before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the [ 449 ]

Rights and powers of the vendee.

\* Stiernhook. *De Jure Goth.* l. 2, c. 5.

<sup>f</sup> Hob. 41.

money, because by the contract, the property was in the vendee.<sup>s</sup> Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself. And it is no objection to the validity of a sale of goods at a future day, that the vendor is not in possession thereof at the time of the contract; but intends to go into the market and buy them before the day of delivery.<sup>h</sup>

Sales where the vendor has no property in the goods.

But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is,<sup>i</sup> that all sales and contracts of anything vendible, in fairs or markets *overt*, (that is, open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the Mirror informs us,<sup>k</sup> were tolls established in markets, viz. to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses.<sup>l</sup> Market overt in the country is only held on special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day.<sup>m</sup> The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt;<sup>n</sup> but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in,<sup>o</sup> and this although the goods cannot be seen from the street.<sup>p</sup> But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever

Sale in market overt.

<sup>s</sup> Noy, c. 42.

<sup>h</sup> *Wells v. Porter*, 2 Bing. N. C. 722; *Hibbleswhite v. M'Morine*, 5 M. & W. 462; overruling *Bryan v. Lewis*, Ry. & Moo. 386.

<sup>i</sup> 2 Inst. 713.

<sup>k</sup> C. 1, s. 3.

<sup>l</sup> *LL. Ethel.* 10, 12; *LL. Eadg.*: Wilk. 80.

<sup>m</sup> Cro. Jac. 68.

<sup>n</sup> Godb. 131.

<sup>o</sup> 5 Rep. 83; 12 Mod. 521.

<sup>p</sup> *Lyons z. De Passe*, 9 C. & P. 68. 3 P. & D. 177.



I find them. And it is expressly provided by stat. 1 Jac. I. c. 21, that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property : for this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him ; though it binds infants, feme [ 450 ] coverts, idiots or lunatics, and men beyond sea or in prison : or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market ; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods.<sup>o</sup> So likewise, if the buyer knoweth the property not to be in the seller ; or there be any other fraud in the transaction ; if he knoweth the seller to be an infant, or feme covert not usually trading for herself : if the sale be not originally and wholly made in the fair or market, or not at the usual hours ; the owner's property is not bound thereby.<sup>p</sup> If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price ; unless the property had been previously altered by a former sale.<sup>q</sup> And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice.<sup>r</sup> By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bonâ fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller. And by stat. 7 & 8 Geo. IV. c. 29, s. 57, it is enacted that the owner shall have the stolen property restored to him upon the prosecution and conviction of the offender by or on behalf of the owner, except where the property stolen consists of valuable securities which have been *bonâ fide* discharged, or negotiable instru-

<sup>o</sup> Bacon's Use of the Law, 158.<sup>q</sup> Perk. s. 93.<sup>p</sup> 2 Inst. 713, 714.<sup>r</sup> 2 Inst. 713.

ments for which a valuable consideration has been paid by any third party without notice.

Sale of  
horses.

But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses.\* For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. & M. c. 7, and 31 Eliz. c. 12. By which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such [ 451 ] fair or market: that toll be paid, if any be due; and if not, one penny to the book-keeper, who shall enter down the price, colour and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

Warranty on  
sale of goods.

By the civil law† an implied warranty was annexed to every sale in respect to the title of the vendor: and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose.‡ But, with regard to the goodness of the wares so purchased, the vendor is not bound to answer; unless he expressly warrants them to be sound and good,⁴ or unless he knew them to be otherwise and

\* 2 Inst. 719.

† Ff. 21, 2, 1.

‡ Cro. Jac. 474; 1 Roll. Abr. 90.

⁴ F. N. B. 94.

hath used any art to disguise them,<sup>x</sup> or unless they turn out to be different from what he represented to the buyer.

2. Bailment, from the French *bailler*, to deliver, is a <sup>2. Bailment.</sup> delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or, (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanly manner.<sup>y</sup> If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the person appointed.<sup>z</sup> If a horse, or other goods, be delivered to an innkeeper or his servants, he is bound to keep them safely, and restore them when [ 452 ] his guest leaves the house.<sup>a</sup> If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner.<sup>b</sup> If a pawnbroker receives plate or jewels as a pledge or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time :<sup>c</sup> for the due execution of which contract many useful regulations are made by several recent statutes.<sup>d</sup> And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainers, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale ; or, when sold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand : and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise ;<sup>e</sup> unless he expressly undertook<sup>f</sup> to keep it only with the same care as his own goods, and

<sup>x</sup> 2 Roll. Rep. 5.

<sup>y</sup> 1 Vern. 268.

<sup>z</sup> 12 Mod. 482.

<sup>a</sup> Cro. Eliz. 622.

<sup>b</sup> Cro. Car. 271.

<sup>c</sup> Cro. Jac. 245 ; Yelv. 178.

<sup>d</sup> These statutes are consolidated by the stat. 39 & 40 G. 3, c. 99.

<sup>e</sup> Co. Litt. 89.

<sup>f</sup> 4 Rep. 84.

then he should not be answerable for theft or other accidents. But now the law seems to be settled,<sup>a</sup> that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially for a sufficient consideration to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own.<sup>b</sup>

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The bailee has a qualified property in the goods pledged.

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainer, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person.<sup>i</sup> For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor. The rights of factors in the goods in their possession are now regulated by stat. 6 G. IV. c. 94.

3. Hiring and borrowing.

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower; in which there is only this difference, that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and transient property is transferred for a particular time or use, on condition to restore the goods so

<sup>a</sup> Lord Raym. 909; 12 Mod. 487.

<sup>b</sup> By the laws of Sweden the depositary or bailee of goods is not bound to restitution, in case of accident by fire or theft: provided his own goods

perished in the same manner: "*jura enim nostra*," says Stiernhook, "*dolum præsument, si una non pereant*." (De jure Sueon. l. 2, c. 5.)

<sup>i</sup> 13 Rep. 69.

hired or borrowed, as soon as the time is expired or use performed ; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation and not abuse it ; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period ; on the expiration of which his qualified property determines and the owner becomes (in case of hiring) entitled also to the price, for which the horse was hired.<sup>k</sup>

There is one species of this price or reward, the most [ 454 ] usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientie*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use ; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle,<sup>l</sup> that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the divine law, both natural and revealed ; and the canon law<sup>m</sup> has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

Money lent  
at interest.

<sup>k</sup> Yelv. 172 ; Cro. Jac. 236.

hath been suspected to be spurious.

<sup>l</sup> *Polit.* l. 1, c. 10. This passage

<sup>m</sup> *Decretal.* l. 5, tit. 19.

How far justifiable.

But, in answer to this, it hath been observed, that the Mossaical precept was clearly a political and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger;<sup>a</sup> which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*; since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only for the purposes of exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it: or at least the case of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exor-

<sup>a</sup> Deut. xxiii, 20.

bitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money; but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders: and those principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themselves from the danger of the penalty by making that profit exorbitant. A capital distinction must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotius,<sup>o</sup> "if the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, its allowance is neither repugnant to the revealed nor the natural law: but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they never can make it just." [ 456 ]

We see, that the exorbitance or moderation of interest, for money lent, depends upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community,

Interest on  
money lent,  
how regu-  
lated.

<sup>o</sup> *De j. b. and p. l. 2, c. 12, s. 22.*

there is a certain quantity of money thus necessary ; which a person well skilled in political arithmetic might perhaps calculate as exactly as a private banker can the demand for running cash in his own shop : all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders ; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be : but where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public,

[ 457 ] interest will be proportionably high ; for lenders will be but few, as few can submit to the inconvenience of lending.

So also the hazard of an entire loss has its weight in the regulation of interest : hence, the better the security, the lower will the interest be ; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent.* : a man that has money by him will perhaps lend it upon good personal security at *five per cent.*, allowing two for the hazard run ; he will lend it upon landed security or mortgage at *four per cent.*, the hazard being proportionably less ; but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent.*, the hazard being none at all. And the legislature, as we shall see in the course of this chapter,<sup>p</sup> has of late considerably relaxed the usury laws, in favour of trade.

But before this relaxation was made, the hazard was sometimes greater than the rate of interest allowed by law would compensate. And this gave rise to the practice of 1. *Bottomry*, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

1. *Bottomry*. And first, *bottomry* (which originally arose from permitting the master of a ship, in a foreign country, to hypo-

<sup>p</sup> See *post*, p. 522.



thecate the ship in order to raise money to refit,<sup>9</sup>) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender.<sup>1</sup> And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant £1,000 to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed:<sup>2</sup> which kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima*.<sup>3</sup> But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37, that all monies lent on bottomry or at *respondentia*, on vessels belonging to British subjects, bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandize; that the lender shall have the benefit of salvage;<sup>4</sup> and that if the borrower hath not an interest in the ship, or in the effects

<sup>9</sup> This opinion is doubted by Lord Tenterden, in his *Treatise on Shipping*, p. 143, 4th edit.

<sup>1</sup> Moll *De Jur. Mar.* 361; Malyne. *Lex Mercut.* b. 1, c. 31; Bacon's *Essays*, c. 41; Cro. Jac. 208;

Bynkersh. *Quæst. Jur. Privat.* l. 3, c. 16.

<sup>2</sup> 1 Sid. 27.

<sup>3</sup> Molloy, *Ibid.* Malyne, *Ibid.*

<sup>4</sup> See Rights of Persons, p. [294].

on board equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandize be totally lost.

2. A policy of insurance.

Secondly, a policy of *insurance* is a contract between A. and B., that, upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event. This is founded upon one of the

On ships.

same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent.*; here I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose £100 and get £5. Now this is much the same

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as if I lend the merchant whose whole fortunes are embarked in this vessel, £100, at the rate of *eight per cent.* For by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent.*: if therefore I had actually lent him £100, I must have added £3 on the score of inconvenience, to the £5 allowed for the hazard, which together would have made £8. But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus

On lives.

too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow £100 of Titius for a year: the inconvenience and general hazard of this loan, we have seen, are equivalent to £5, which is therefore the legal interest: but there is also a special hazard in this case; for, if Sempronius dies, within the year, Titius must lose the whole of his £100. Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth £10 more, and therefore that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to avoid

abuses, will not, or at any rate would not\* permit to be taken : Sempronius therefore gives Titius the lender only £5, the legal interest ; but applies to Gaius an insurer, and gives him the other £10 to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach ; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III. c. 48, that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest : that in all policies the name of such interested party shall be inserted ; and nothing more shall be recovered thereon [ 460 ] than the amount of the interest of the insured. And it is now settled that the interest must be a direct pecuniary interest to the insurer, and a party has not in general such an interest in the life of his wife or child, as he can legally make the subject of an assurance, and all such policies are therefore void.<sup>z</sup>

This statute doth not however extend to marine insurances, which were provided for by a prior law of their own. Marine insurances. The learning relating to these insurances hath of late years been greatly improved by a series of judicial decisions ; which have now established the law in a variety of cases, which have recently been well and judiciously collected,<sup>y</sup> and now form a very complete title in the code of commercial jurisprudence ; but, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. Thus much however may be said ; that, being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment : and, on the other

\* See *ante*, p. 514, and *post*, pp. 522.

<sup>z</sup> *Halford v. Kymer*, 10 B. & C. 724.

<sup>y</sup> By the late Mr. Justice Park, in his *System of the Law of Marine Insurance*.

Wagering  
policies.

[ 461 ]

3. Annuities.

hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But as a practice had obtained of insuring large sums without having any property on board, which were called insurances *interest or no interest*; and also of insuring the same goods several times over; both of which were a species of gaming, without any advantage to commerce, and were denominated *wagering* policies: it is therefore enacted by the statute 19 Geo. II. c. 37, that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, (all of which had the same pernicious tendency) shall be totally null and void, except upon privateers, or upon ships or merchandize from the Spanish and Portuguese dominions, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead; and lastly that, in the East India trade the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the borrower shall (in case of a loss) recover no more upon any insurance than the surplus of his property above the value of his bottomry or *respondentia* bond.

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore

the price of such annuities cannot without the utmost difficulty be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bond fide* (and not colourably\*) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw however some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III. c. 26, directed, that upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee simple or stock in the public funds) the true consideration, which should be in money only, should be set forth and described in the security itself; and a memorial of the date of the security, of the names of the parties, *cestui que trusts, cestui que vies*, and witnesses, and of the consideration money, should within twenty days after its execution be enrolled in the court of chancery; else the security should be null and void: and, in case of collusive practices respecting the consideration, the court, in which any action was brought [ 462 ] or judgment obtained upon such collusive security, might order the same to be cancelled, and the judgment (if any) to be vacated: and also all contracts for the purchase of annuities from infants should remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. This act is repealed by stat. 53 Geo. III. c. 141, which enacts, (s. 1,) that within thirty days after the execution of any assurance creating an annuity or rent charge for life or years determinable on lives, a memorial shall be enrolled according to the form thereby given; and by s. 6, in case any part of the consideration money shall be returned to the person advancing the same, or if it be advanced in notes, if those notes are not paid when due, or if the consideration, being in goods, is expressed to be in money, then the court on application of the party against whom any action shall be brought on the deed may stay proceedings, or vacate the judgments and order the deed to be cancelled. By s. 8, all contracts for annuities made by

\* Carth. 67. *Burdon v. Browning*, 1 Taunt. 522. *Morris v. Jones*, 2 B. & C. 232.

infants are void notwithstanding any confirmation by them after coming of age. The statute, however, does not extend to Scotland or Ireland, nor to annuities or rent-charges granted by will, marriage settlement, or for the advancement of children; nor to any annuity secured upon freeholds or copyholds of equal or greater annual value than the annuity over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater value than the said annuity, nor to any voluntary annuity or rent-charge granted without any pecuniary consideration, nor to any annuity granted by any body corporate, or under any authority or trust created by act of parliament (s. 10). This act has been explained by statutes 3 Geo. IV. c. 92; and 7 Geo. IV. c. 75. But to return to the doctrine of common interest on loan:

The different rates of interest.

Upon the two principles of inconvenience and hazard, compared together, different nations have at different times established different rates of interest. The Romans at one time allowed *centesima*, one per cent. monthly or *twelve per cent. per annum*, to be taken for common loans; but Justinian<sup>a</sup> reduced it to *trientes*, or one third of the

<sup>a</sup> Cod. 4, 32, 26. Nov. 33, 34, 35.—A short explication of these terms, and of the division of the Roman *as*, will be useful to the student, not only for understanding the civilians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, *ad Pisones*, 325.

*Romani pueri longis rationibus assem  
Dicunt in partes centum diducere.*

*Dicat*

*Filius Albini, si de quincunce remota  
est*

*Uncia, quid superet? poterat diciase:  
triens, eu,*

*Rem poteris servare tuam! redit uncia,  
quid fit? Semis.—*

It is therefore to be observed, that, in calculating the rate of interest, the

Romans divided the principal sum into an *hundred* parts; one of which they allowed to be taken monthly: and this, which was the highest rate of interest permitted, they called *usura centesima*, amounting yearly to twelve per cent. Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts, or *uncia*, therefore these twelve monthly payments or *unciae* were held to amount annually to one pound, or *as usurarius*; and so the *usura asses* were synonymous to the *usura centesima*. And all lower rates of interest were denominated according to the relation they bore to this centesimal usury, or *usura asses*: for the several multiples of the *uncia*, or duodecimal parts of the *as*, were known by dif-

as or *centesimæ*, that is, *four per cent.*; but allowed high interest to be taken of merchants, because there the hazard was greater. So too Grotius informs us,<sup>b</sup> [ 463 ] that in Holland the rate of interest was then eight *per cent.* in common loans, but twelve to merchants. And Lord Bacon was desirous of introducing a similar policy in England:<sup>c</sup> but our law, until very recently, established one standard for all alike, where the pledge or security itself is not put in jeopardy; lest, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. But as to the rate of legal interest, it has varied and decreased for three hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9, confined interest to ten *per cent.*, and so did the statute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successor the statute 21 Jac. I. c. 17, reduced it to eight *per cent.*; as did the statute 12 Car. II. c. 13, to six: and lastly by the statute 12 Ann. st. 2, c. 16, it

ferent names according to their different combinations; *sextans*, *quadrans*, *triens*, *quincunx*, *semis*, *septunx*, *bes*, *dodrans*, *dextans*, *deunx*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *uncia* or duodecimal parts

of an *as*. (*Ff.* 28, §. 50, s. 2; Gravin. *orig. jur. civ.* l. 2, s. 47.) This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURÆ.	PARTES ASSIS.	PER ANNUM.
<i>Ases, sive centesimæ</i>	<i>integer</i>	12 <i>per cent.</i>
<i>Decunces</i>	$\frac{11}{12}$	11
<i>Dextances, vel decunces</i>	$\frac{10}{12}$	10
<i>Dodranles</i>	$\frac{9}{12}$	9
<i>Besses</i>	$\frac{8}{12}$	8
<i>Septunces</i>	$\frac{7}{12}$	7
<i>Semisses</i>	$\frac{6}{12}$	6
<i>Quincunces</i>	$\frac{5}{12}$	5
<i>Trienles</i>	$\frac{4}{12}$	4
<i>Quadrantes</i>	$\frac{3}{12}$	3
<i>Sextances</i>	$\frac{2}{12}$	2
<i>Uncia</i>	$\frac{1}{12}$	1

<sup>b</sup> *De jur. b. and p.* 2, 12, 22.

<sup>c</sup> *Essays*, c. 41.

was brought down to five *per cent.* yearly, which was the extremity of legal interest that could be taken. But yet, under this statute, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in [ 464 ] which the contract was made.<sup>d</sup> Thus Irish, American, Turkish, and Indian interest, have been allowed in our courts to the amount of even twelve *per cent.*: to which amount however Indian interest is now restricted,<sup>e</sup> for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. And by statute 14 Geo. III., c. 79, explained by 1 & 2 Geo. IV., c. 51, all mortgages and other securities upon estates or other property in Ireland or the plantations, bearing interest not exceeding six *per cent.* shall be legal; though executed in the kingdom of Great Britain: unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed. And the legislature has recently been disposed to relax the usury laws,<sup>f</sup> in favour of trade, for by stat. 3 & 4 W. IV., c. 98, s. 7, it is enacted that no person taking more than the rate of legal interest for the loan of money on any bill or note, not having more than three months to run, shall be subject to any penalty or forfeiture; nor shall the liability of any party to any such bill be affected by any statute in force for the prevention of usury; and by statute 5 & 6 W. IV., c. 41, it is enacted that bills or other securities shall not be totally void, because a higher rate of interest than is allowed by the stat. of 12 Ann. st. 2, c. 16, has been received thereon. Further by stat. 7 W. IV., and 1 Vict., c. 80, s. 1, it was enacted that bills of exchange, payable at or within twelve months, should not be liable for a limited time, to the laws for the prevention of usury: and by several later acts,<sup>g</sup> this act is extended to the 1st of

Relaxation  
of the usury  
laws.

<sup>d</sup> 1 Equ. Cas. Abr. 289; 1 P. Wms. 895.

<sup>e</sup> 13 Geo. 3, c. 63, s. 30.

<sup>f</sup> See these laws stated, *Public Wrongs*, ch. 12.

<sup>g</sup> 2 & 3 Vict. c. 67. 3 & 4 Vict. c.



January, 1846; and it is enacted, by stat. 2 & 3 Vict. c. 37, that no bill of exchange or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, *nor any contract for the loan or forbearance of money, above the sum of 100l.* shall by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive, or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note be void, nor shall any person so lending, &c. be liable to the penalties under the usury laws; but it is expressly provided, that nothing in the act shall extend to the loan or forbearance of any money on the security of lands; and by s. 2, five per cent. is to be considered the legal rate of interest, except it shall appear that any different rate of interest was agreed to between the parties; and by s. 3, nothing in the act is to affect the law as to pawnbrokers.<sup>b</sup>

4. The last general species of contracts, which I have <sup>4. Debt.</sup> to mention, is that of *debt*; whereby *chose in action*, or a right to a certain sum of money, is mutually acquired and lost.<sup>1</sup> This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price as a *chose in action*, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract, in short, whereby

88. 4 & 5 Vict. c. 54. And 6 & 7 Vict. c. 45.

<sup>b</sup> As to the construction of these acts, see *Connop v. Meaks*, 2 Ad. & El.

326. *Berrington v. Collis*, 5 Bing. N. C. 332. *Holt v. Miers*, 5 Mee. & W. 168.

<sup>1</sup> F. N. B. 119.

[ 465 ] a determinate sum of money becomes due to any person, and is not paid but remains in action merely, is a contract of debt. And taken in this light, it comprehends a great variety of acquisition ; being usually divided into debts of *record*, debts by *special*, and debts by *simple* contract.

Debt of record.

A debt of *record* is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law : this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance are also a sum of money, recognised or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like : and these, together with statutes merchant and statutes staple, &c., if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.* debts of record ; since the contract, on which they are founded, is witnessed by the highest kind of evidence, *viz.* by matter of record.

Debts by specialty.

Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation ; which last we took occasion to explain in the twenty-second chapter of the present book ; and then showed that it is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like ; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

Debts by simple contract.

[ 466 ] Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any ; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is

easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, will be more properly treated of when the breach of such contracts will be considered.<sup>k</sup> I shall only observe at present, that by the statute 29 Car. II. c. 3, no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing, and signed by the party himself or by his authority. And by stat. 9 Geo. IV., c. 14, s. 5, no person shall be charged upon any promise made after full age, to pay any debts contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, or by reason of any representation as to the character, ability, or dealings of any other person, to the intent that such person shall obtain credit, unless such promise or representation be made in writing, signed by the party to be charged therewith. It may here be again remarked,<sup>l</sup> that by stat. 3 & 4 W. IV., c. 104, where any person shall die seized of any real estates, whether freehold or copyhold, the same shall be assets for the payment of all his just debts, whether due on simple contract or specialty.

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

A *bill of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is

Bills of exchange.

<sup>k</sup> See *Private Wrongs*.

<sup>l</sup> See *ante*, p. 387.

an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B. who lives in England 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. But the invention of it was a little earlier: For the Jews were banished out of Guienne, in 1287, and out of England in 1290;<sup>m</sup> and in 1236 the use of paper credit was introduced into the Mogul empire in China.<sup>n</sup> In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee*; the third person, or negociator, to whom it is payable (whether specially named, or the *bearer* generally) is called the *payee*.

which are  
either foreign  
or inland.

These bills are either *foreign*, or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, when both the drawer and the drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17, the other 3 & 4 Ann. c. 9, both made perpetual by stat. 7 Ann. c. 25, inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken

<sup>m</sup> 2 Carte. Hist. Engl. 203, 206.

<sup>n</sup> Mod. Un. Hist. iv. 499.

notice of merely as such,<sup>o</sup> being by those statutes expressly enacted with regard to the other. So that now there is not in law, with the exception hereafter noticed, any manner of difference between them.

Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also by the same statute 3 & 4 Ann. c. 9, are made assignable and indorsable in like manner as bills of exchange. But, by statute 15 Geo. III. c. 51, re-enacted by 48 Geo. III. c. 88, all promissory or other notes, bills of exchange, [ 468 ] drafts, and undertakings in writing, being negociable or transferable, for the payment of less than twenty shillings, are declared to be null and void : and it is made penal to utter or publish any such ; they being deemed prejudicial to trade and public credit. And by 17 Geo. III. c. 30, all such notes, bills, drafts, and undertakings, to the amount of twenty shillings, and less than five pounds, are subjected to many other regulations and formalities ; the omission of any one of which vacates the security, and is penal to him that utters it. This act, so far as it related to promissory notes, drafts, or undertakings in writing, payable on demand to the bearer, was suspended by stat. 3 Geo. IV. c. 70, which latter act was repealed by stat. 7 Geo. IV. c. 6, which (s. 3) imposed a penalty of 20*l.* on any person issuing any bank note for less than 5*l.* after the 5th of April, 1829, made, drawn, or indorsed, in any other manner than is directed by the 17 Geo. III. c. 30.<sup>p</sup> It is to be remembered also that inland bills of exchange and promissory notes must be stamped according to the provisions of stat. 55 Geo. III. c. 148.<sup>q</sup>

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession, but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* con-

Promissory  
notes.

The property  
of the payee  
in a bill or  
note.

<sup>o</sup> 1 Roll Abr. 6.

<sup>p</sup> The acts for enabling bankers to issue promissory notes and bills of exchange, need only be here referred

to. See 9 Geo. 4, c. 23, and the Bank of England Act, 3 & 4 W. 4, c. 93.

<sup>q</sup> See Rights of Persons, p. [324].

tract, *viz.* that, provided the drawee does not pay the bill, the drawer will : for which reason it is usual, in bills of exchange, to express that the *value* thereof hath been *received* by the drawer ;\* in order to show the consideration upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man : contrary to the general rule of the common law, that no *choses in action* is assignable : which assignment is the life of paper credit. It may therefore be of some use to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

How a bill or  
note is in-  
dorsed.

[ 469 ]

Acceptance.

Protest for  
non-accept-  
ance.

In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by indorsement, or writing his name *in dorso* or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee ; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A. or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it.<sup>a</sup> But, in case of a bill of exchange, the payee, or indorsee (whether it be a general or particular indorsement) is to go to the drawee, and offer his bills for acceptance ; which acceptance of an inland bill (so as to charge the drawer with costs) by 1 & 2 Geo. IV. c. 78, s. 2, must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing,<sup>†</sup> he then makes himself liable to pay it ; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of £20, or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance* ; which protest must be made in writing, under a copy of such bill of exchange, by some notary public ; or, if no such notary be resident

\* *Str.* 1212.

<sup>a</sup> 2 *Show.* 235 ; *Grant v. Vaughan*,

*T.* 4. *Geo.* 3, B. R.

<sup>†</sup> *Str.* 1000.

in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.

But, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it on the last of the three days after it becomes due, (which three days are called *days of grace*\*) the payee or indorsee is then to get it (if it be a foreign bill) protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer.† And he, on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law,‡) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill; but in order to recover special damages and costs occasioned by the non-acceptance or non-payment of an inland bill, it is not necessary to protest the bill, or to give evidence of any such protest.‡ The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof: for otherwise the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of

Days of  
grace.

Protest for  
non-pay-  
ment.

[ 470 ]

\* Bills of exchange becoming due on fast or thanksgiving days are payable on the day next preceding such fast or thanksgiving day, 7 & 8 Geo. 4, c. 15.

† The stat. 2 & 3 W. 4, c. 98, regulates the protesting for non-payment

of a bill of exchange drawn payable at a place not being the residence of the drawee. See *Mitchell v. Baring*, 10 B. & C. 4; and 6 & 7 W. 4, c. 58.

‡ Lord Raym. 993.

‡ *Windle v. Andrews*, 2 B. & A. 696.

time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee.<sup>a</sup>

Remedies of  
the drawee of  
a bill of ex-  
change  
against the  
drawer and  
indorsers.

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has nobody to resort to, but the drawer only.

Remedies of  
the payee of  
a promissory  
note against  
the drawer  
and in-  
dorsers.

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another: only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

Shares in  
public com-  
panies.

Lastly, among contracts of this species may be placed that which arises from the holding shares in a public or joint-stock company, in which undertakings of various descriptions a very large capital is now embarked. Many of these relate to land, as railway, canal, and mining companies; but the shares in them are now usually declared to be personal estate by the act of parliament or deed of settlement constituting the company. The shares in the Avon navigation, however, are real estate;<sup>a</sup> so are those in the New River.<sup>b</sup> But the shares in the Chelsea Water-works company were held to be personal estate, although there was no declaration to that effect in the act. And it was also decided that real property, held for the purposes of a

<sup>a</sup> Salk. 127.

*Baker*, 1 B. & C. 699.

<sup>b</sup> *Buckridge v. Ingram*, 2 Ves. Jun. 652; and see *Earl of Portman v.*

*Townsend v. Ash*, 3 Atk. 336.



trading company, is in equity to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the particular concern;<sup>c</sup> the leaning of the courts, both of law and equity, being now to hold all shares in public companies to be personal estates, and transferrible accordingly. Where an act of parliament, or a charter of incorporation, has been obtained by the company, the shares may be transferred in the mode recognised by such act or charter. And after assignment, the assignees hold the shares on the same conditions, and are subject to the same rules and orders as the original subscribers, and are to all intents and purposes substituted in the place of the original subscribers.<sup>d</sup> But where an act prescribes certain forms in the transfer of the company's shares, unless they are strictly complied with, the shares remain in the order and disposition of a bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage:<sup>e</sup> and where the mortgagor is a trader, and the shares are personal estate, the transfer must be made in the books, in order to render the security valid against the assignment in bankruptcy.<sup>f</sup> It seems also clear, that though there be no act of parliament, or charter of incorporation, a share in a company for a proper object may be transferred, and the responsibility affecting the share may be transferred to the assignee.<sup>g</sup>

<sup>c</sup> *Brent v. Brent*, 2 Yo. and Jer. 268. *Bradley v. Holdsworth*, 2 M. & W. 422. *Humble v. Holdsworth*, 11 Ad. & E. 205.

<sup>d</sup> *The Huddersfield Canal Company v. Buckley*, 7 T. R. 36.

<sup>e</sup> *Ex parte Lancaster Canal Navigation*, 1 Dea. & Ch. 411.

<sup>f</sup> *Nelson v. London Assurance Company*, 2 Sim. & Stu. 392.

<sup>g</sup> *Nockels v. Crosby*, 2 B. & C. 814.

## CHAPTER THE THIRTY-THIRD.

## [ 471 ] OF TITLE BY BANKRUPTCY AND INSOLVENCY.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

Title by  
bankruptcies.

X. Bankruptcy; a title which we before lightly touched upon,<sup>a</sup> so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a fiat of bankruptcy;<sup>b</sup> and, 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. Who may  
become a  
bankrupt.

1. Who may become a bankrupt. A bankrupt was before<sup>c</sup> defined to be "a trader, who secretes himself, or does "certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a criminal or offender;<sup>d</sup> and in this spirit we are told by Sir Edward Coke,<sup>e</sup> that we have fetched as well the name, as the wickedness, of bankrupts from foreign nations.<sup>f</sup> But

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<sup>a</sup> See page 331.

<sup>b</sup> Previous to the 1 & 2 W. 4, c. 56, a commission of bankruptcy was sued out, but by virtue of that statute a fiat now issues.

<sup>c</sup> See page 331.

<sup>d</sup> Stat. 1 Jac. 1, c. 15, s. 17.

<sup>e</sup> 4 Inst. 277.

<sup>f</sup> The word itself is derived from the word *bancus* or *banque*, which

signifies the table or counter of a tradesman (Dufresne, I. 969), and *raptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather choose to adopt the word *route*, which in French signifies a trace or track, and tell us that a bankrupt is one who hath removed his *banque*, leaving but a trace behind. (4 Inst.

at present, the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors; by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigour of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables, whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if indeed that law, *de debitore in partes secando*, is to be understood in so very butcherly a light: which many learned men have with reason doubted.<sup>8</sup> Nor do I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain) of imprisoning the debtor's person in chains; subjecting him to stripes and hard labour at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery *trans Tiberim*:<sup>b</sup> an oppression, which produced so many popular insurrections, [ 473 ] and secessions to the *mons sacer*. But I mean the law of *cession*, introduced by the christian emperors; whereby,

The Roman law of bankruptcy.

277.) And it is observable that the title of the first English statute concerning this offence, 34 Hen. 8. c. 4, "against such persons as do make bankrupt," is a literal translation of the French idiom, *qui font banque route*.

<sup>8</sup> Taylor. *Comment. in L. decemviral*. Bynkerh. *Observ. Jur. I. I.* Heinecc. *Antiq. III.* 80, 4.

<sup>b</sup> In Pegu and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children: insomuch that he may even violate with impunity the chastity of the debtor's wife: but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu semoto.*"<sup>i</sup> For, as the emperor justly observes,<sup>h</sup> "*inhumanum erat spoliatum fortunis suis in solidum damnari.*" Thus far was just and reasonable; but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted,<sup>1</sup> that if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

The law of  
England.

The laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and until recently the benefit of the laws of bankruptcy was extended to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life ran in debt without the power of payment, they must have taken the consequences of their own indiscretion, even though they met with sudden accidents that reduced their fortunes: for the law held it to be an unjustifiable practice, for any person but a trader to encumber himself with

[ 474 ] debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile

how re-  
stricted.

<sup>i</sup> Cod. 7, 71, *per tot.*

<sup>h</sup> Inst. 4, 6, 40.

<sup>1</sup> Nov. 135, c. 1.

transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune, and not his fault. To the misfortunes therefore of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared, that no one shall be capable of being made a bankrupt, but only a *trader*; nor capable of receiving the full benefit of the statutes, but only an *industrious* trader.<sup>m</sup> But now the policy of the law is somewhat altered, as where there is no fraud or culpable neglect, other persons may derive some of the benefit of these statutes.<sup>n</sup>

The first statute made concerning any English bankrupts, was 34 Hen. VIII. c. 4, when trade began first to be properly cultivated in England: which has been almost totally altered by statute 13 Eliz. c. 7, whereby bankruptcy was confined to such persons only as had *used the trade of merchandise* in gross or by retail, by way of bargaining, exchange, rechange, bartering, chevisance,<sup>o</sup> or otherwise; or have *sought their living by buying and selling*. And by statute 21 Jac. I. c. 19, persons using the trade or profession of a *scrivener*, receiving other men's monies and estates into their trust and custody, were also made liable to the statutes of bankruptcy: and the benefits, as well as the penal parts of the law, were extended as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30,<sup>p</sup> *bankers*, *brokers*, and *factors*, were declared liable to the statutes of

The statutes relating to the bankrupt laws.

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<sup>m</sup> See 3 & 4 W. 4, c. 104, stated *ante*, p. 500. and *post* p. 552.

<sup>o</sup> That is, making contracts. (Dufresne, II. 569.)

<sup>p</sup> See 5 & 6 Vict. s. 116, *ante* p. 335, P Sec. 39.

bankruptcy; and this upon the same reason that scriveners were included by the statute of James I., *viz.* for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act,<sup>p</sup> no *farmer, grazier, or drover*, shall (as such) be liable to be deemed a bankrupt: for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet their trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents; wherefore also, upon a similar reason, a *receiver of the king's taxes* is not capable,<sup>q</sup> as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. No person shall have a fiat of bankruptcy awarded against him, unless at the petition of some *one* creditor, to whom he owes 50*l.*; or of *two*, to whom he is indebted 70*l.*; or of *more*, to whom altogether he is indebted 100*l.* For the law does not look upon persons, whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statute themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.<sup>r</sup> But any person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time

[ 476 ] shall not have arrived when such trader committed an act of bankruptcy, may be a petitioning creditor.

Interpreta-  
tion of the  
bankrupt  
acts.

In the interpretation of these several statutes, it hath been held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it shall be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or, in one general word, a *chapman*, who is one that buys

<sup>p</sup> Sec. 40.

<sup>q</sup> Sec. *ead.*

<sup>r</sup> 5 & 6 Vict. c. 122, s. 9, 1 & 2 W.  
4, c. 56. But see *ante*, p. 535.

and sells anything. But no handicraft occupation (where nothing is bought and sold, and where therefore an extensive credit for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour.<sup>a</sup> And though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding-house, and makes considerable gains by buying and selling what he spends in the house; and such a one is clearly not within the statutes;<sup>c</sup> but a market-gardener is now liable to the bankrupt laws.<sup>d</sup> Where persons buy goods, and make them up into saleable commodities, as shoemakers, smiths, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupts;<sup>e</sup> for the labour is only in melioration of the commodity, and rendering it more fit for sale.<sup>f</sup>

One single act of buying and selling will not in general make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandise, within the intent of the statute, by which a profit may be fairly made.<sup>g</sup> Neither will buying and selling under particular restraints, or for particular purposes; as if a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes.<sup>h</sup> An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for necessities; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts, which he is not liable at law to pay.<sup>i</sup> But a feme covert in London, being a

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<sup>a</sup> Cro. Car. 31.<sup>b</sup> Skinn. 292; 3 Mod. 330.<sup>c</sup> 5 & 6 Vict. c. 122, s. 10.<sup>d</sup> Cro. Car. 31; Skinn. 292.<sup>e</sup> Blackstone states that an innkeeper could not, as such, be made a bankrupt, but this is now altered. See<sup>f</sup> 6 Geo. 4, c. 16, s. 2, stated *post*, p. 538.<sup>g</sup> *Ex parte Gallimore*, Rose, 234,<sup>h</sup> 2 P. Wms. 308.<sup>i</sup> 1 Salk. 110; Skinn. 292.<sup>j</sup> Lord Raym. 443.

sole trader according to the custom, was liable to a commission and now to a fiat of bankruptcy.<sup>c</sup>

6 Geo. IV. c. 16, s. 2, and 5 & 6 Vict. c. 122, s. 10, declaring who are bankrupts.

These and some other doubtful points are now set at rest by the General Bankrupt Act, 6 Geo. IV. c. 16, by which all previous acts are repealed; and by s. 2, it is enacted that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight or other matters, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, commission, consignment, or otherwise in gross or by retail, and all persons who either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies, established by charter or act of parliament, shall be deemed, as such, a trader, liable by virtue of this act to become bankrupt.

By stat. 5 & 6 Vict. c. 122, s. 10, livery stable keepers, coach proprietors, carriers, ship owners, auctioneers, apothecaries, market gardeners, cowkeepers, brick makers, alum makers, lime burners, and millers, are added to the list of persons liable to become bankrupts.

2. By what acts a man may become bankrupt.

2. Having thus considered who may, and who may not be made a bankrupt, we are to inquire, secondly, by what acts a man may become a bankrupt. A bankrupt is a "trader, who secretes himself, or does certain other acts, tending to defraud his creditors." We have hitherto been employed in explaining the former part of this description, "a trader;" let us now attend to the latter, "who secretes himself, or does certain other acts, tending to defraud his creditors." And, in general, whenever such a trader, as is before described, hath endeavoured to avoid his credi-

<sup>c</sup> *La Vie v. Philips*, M. 6 Geo. 3, B. R.



tors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a fiat may be sued out. For in this extra-judicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. And these are now expressly defined by the General Bankrupt Act, 6 Geo. IV. c. 16. By s. 3, it is enacted that if any such trader as is mentioned in sect. 1, shall depart this realm, or being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestrated, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy. By s. 4, a conveyance of all a trader's property is not to be an act of bankruptcy, unless a commission shall issue within six months. By s. 5, lying in prison for debt, or escaping out of prison, are acts of bankruptcy; by s. 6, a declaration of insolvency left at the bankrupt office, is an act of bankruptcy; and by s. 9,

6 Geo. IV. c. 16, s. 3, as to acts of bankruptcy.

any trader having privilege of parliament may be proceeded against as other traders.<sup>d</sup> So also by stat. 5 & 6 Vict. c. 122, if a trader, having been summoned before the Court of Bankruptcy for the payment of a debt, shall decline to attend, or shall refuse to pay, this shall be deemed an act of bankruptcy.<sup>e</sup> So a trader, who does not pay or secure a judgment debt, or discharge an order of a court of equity, for payment of money, or who files a declaration of insolvency, commits an act of bankruptcy.<sup>f</sup>

It has further been recently provided, that a trader may file in the office of the Secretary of Bankrupts a declaration, in writing, that he is unable to meet his engagements; and he shall thereby be deemed to have committed an act of bankruptcy, at the time of filing such declaration, provided a fiat shall issue within two calendar months afterwards.<sup>g</sup>

<sup>1 & 2 Vict.  
c. 110.</sup>

But by the act for abolishing imprisonment for debt, 1 & 2 Vict. c. 110, already adverted to, many of the former acts of bankruptcy, as going away to avoid arrest, lying in prison, and others, are nearly at an end; and it is provided by this act (s. 8), that a creditor for 100*l.*, two creditors for 150*l.*, or three or more for 200*l.*, (if the debtor be a trader within the meaning of the bankrupt laws,) may file an affidavit of debt in the Court of Bankruptcy, serve a copy on the debtor with notice of immediate payment, and if the trader do not in 21 days, secure or compound the debt, or enter into a bond with two sureties, to the satisfaction of a commissioner of bankrupts, such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit and notice; but the fiat must be issued within two months from filing the affidavit; and by s. 39, the filing of a petition by an insolvent shall be deemed an act of bankruptcy.

These are the several acts of bankruptcy expressly de-

<sup>d</sup> As to a member of parliament becoming a bankrupt, see Rights of Persons [165.]

<sup>e</sup> 5 & 6 Vict. c. 122, ss. 11—19.

<sup>f</sup> *Ibid.* ss. 20—22.

<sup>g</sup> 6 Geo. 4, c. 16, s. 6. 5 & 6 Vict. c. 122, s. 22. See also 5 & 6 Vict. c. 116, stated *ante*, p. 334.

fined by the statute : which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication. And therefore Sir John Holt held,<sup>b</sup> that a man's removing his goods privately to prevent their being seised in execution, was no act of bankruptcy. For the statutes mention only fraudulent gifts to third persons, and procuring them to be seised by sham process, in order to defraud creditors ; but this, though a palpable fraud, yet falling within neither of these cases, cannot be adjudged an act of bankruptcy. So also it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy ; for it is not within the description of any of the statutes, and they may be good reasons for his so doing, as suspicion of forgery, and the like ; and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy ;<sup>i</sup> but if he goes to prison, and lies there twenty-one days,<sup>k</sup> then, and not before, he is become a bankrupt. But this latter act of bankruptcy, as we have just seen, is now much restricted. By stat. 5 & 6 Vict. c. 122, s. 7, no person shall be liable to become bankrupt upon any act committed more than twelve months.

We have seen *who* may be a bankrupt, and what *acts* will make him so : let us next consider,

3. The *proceedings* on a fiat of bankruptcy, so far as they affect the bankrupt himself. And these depend entirely on the several statutes of bankruptcy ; which I shall endeavour to blend together, and digest into a concise [ 480 ] methodical order.

3. The proceedings on a fiat of bankruptcy.

And, first, there must be a *petition* to the Lord Chancellor by one creditor to the amount of 50*l.*, or by two to the amount of 70*l.*, or by three or more to the amount of 100*l.* ; which debts must be proved by *affidavit* ;<sup>i</sup> upon which a fiat issues, signed by the Lord Chancellor, addressed where the trader resides in or within one hundred miles from London, to the Court of Bankruptcy in

<sup>b</sup> Lord Raym. 725.

<sup>i</sup> Stat. 6 Geo. 4, c. 16, s. 15 ; 5 &

<sup>i</sup> 7 Mod. 189.

6 Vict. c. 122, s. 9.

<sup>k</sup> 6 Geo 4, c. 16, s. 5.

London; and when he resides at a greater distance, to a district Court of Bankruptcy,<sup>m</sup> authorising the petitioning creditor to prosecute his claim before such Court of Bankruptcy, as the case may be.<sup>n</sup> The petitioners, to prevent malicious applications, must until very recently have been bound in a security of 200*l.*, to make the party amends in case they did not prove him a bankrupt;<sup>o</sup> but now, on application to the Lord Chancellor for that purpose, the bond may be dispensed with.<sup>p</sup> And if, on the other hand, they receive any money or effects from the bankrupt, as a recompense for suing out the fiat, so as to receive more than their rateable dividends of the bankrupt's estate, the fiat may be superseded, and they forfeit not only what they shall have so received, but their whole debt, and shall deliver up such money or effects.<sup>q</sup> These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a fiat.

Adjudication.

When the commissioners, whether in town or country, have received the fiat, they are first to receive proof of the petitioning creditor's debt, of the person's being a trader and having committed some act of bankruptcy; and then to adjudge him a bankrupt, if proved so:<sup>r</sup> and to give notice thereof in the Gazette, and at the same time to appoint two or more<sup>s</sup> meetings. At the first of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate was formerly assigned, but in whom it is now vested for the benefit of the creditors, without any assignment, on their bare appointment:<sup>t</sup> and assignees are to be chosen by the major part in value of [ 481 ] the creditors who shall then have proved their debts; but no creditor shall be admitted to vote in the choice of assignees whose debt on the balance of accounts does not

Appointment of assignees.

<sup>m</sup> As to the Court of Bankruptcy, see *Private Wrongs*, p. [37.]

<sup>n</sup> 1 & 2 W. 4, c. 56, s. 12; 5 & 6 Vict. c. 122, s. 47.

<sup>o</sup> 6 Geo. 4, c. 16, s. 13; and see 5 & 6 Vict. c. 122, s. 4.

<sup>p</sup> 5 & 6 Vict. c. 122, s. 8.

<sup>q</sup> 6 Geo. 4, c. 16, s. 8.

<sup>r</sup> 6 Geo. 4, c. 16, s. 24; 5 & 6 Vict. c. 122, s. 23.

<sup>s</sup> 1 & 2 W. 4, c. 56, s. 20.

<sup>t</sup> Sec. 20.

amount to 10*l*.<sup>u</sup> Under the 1 & 2 W. IV. c. 56, s. 22, <sup>Official assignee.</sup> and 5 & 6 Vict. c. 122, s. 48, an official assignee is also to be assigned to the estate by the court, who is to take possession of and receive all the personal estate of the bankrupt, and until assignees shall be chosen by the creditors the official assignee may act as the sole assignee. On the sixtieth day at farthest, after notice in writing, <sup>Surrender of bankrupt.</sup> to be left at his usual place of abode, and the advertisement in the Gazette, (unless the time be enlarged by the court,) the bankrupt must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past:<sup>w</sup> and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, shall be guilty of felony, and may be transported for life, or may be imprisoned for seven years, and his goods and estate shall be distributed among his creditors.<sup>x</sup>

The commissioners have power over the body of the bankrupt,<sup>y</sup> and they may grant a warrant for seizing his body and property, and for this purpose the messenger may break upon the bankrupt's doors.<sup>z</sup> A person against whom a fiat has issued may be arrested on proof of probable cause for believing that he is about to quit England, or to remove or conceal his goods, with intent to defraud his creditors,<sup>a</sup> and a search warrant may be granted as to his property.<sup>b</sup> <sup>Power of commissioners over bankrupt.</sup>

When the bankrupt appears, the commissioners are to <sup>Examination of bankrupt, &c.</sup> examine him touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife and any other person whatsoever suspected of having bankrupt's property in their hands,<sup>c</sup> as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit

<sup>u</sup> 6 Geo. 4, c. 16, s. 61.<sup>w</sup> 5 & 6 Vict. c. 122, s. 23.<sup>x</sup> 6 Geo. 4, c. 16, s. 112, 113, 117;

5 &amp; 6 Vict. c. 122, ss. 32, 33.

<sup>y</sup> 6 Geo. 4, c. 16, s. 12.<sup>z</sup> *Ibid.* s. 27.<sup>a</sup> 5 & 6 Vict. c. 122, ss. 5, 6.<sup>b</sup> *Ibid.* s. 30. See also Public Wrongs, p. [156.]<sup>c</sup> 6 Geo. 4, c. 16, ss. 87, 38.

them to prison without bail, till they submit themselves, and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler, permitting such person to escape, or go out of prison, shall forfeit £500 to the creditors.<sup>d</sup> But by 1 & 2 W. IV. c. 56, s. 7, re-enacted by 5 & 6 W. IV. c. 29, s. 25, it is enacted that no single commissioner shall have power to commit any bankrupt or other person examined before him, otherwise than to the custody of a messenger or other officer of the court, to be by him detained in custody, and brought up before a Subdivision Court, or the Court of Review within three days after the commitment.

[ 482 ] The bankrupt, upon this examination, is bound, upon pain of being transported for life, to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife, and his children) or, in case he conceals or embezzles any effects to the amount of £10, or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony; and his goods and estate shall be divided among his creditors.<sup>e</sup> And if, after an act of bankruptcy, or in contemplation thereof he destroys or falsifies any of his books, or makes false entries, he is guilty of a misdemeanour and liable to imprisonment.<sup>f</sup> And unless it formerly appeared that his inability to pay his debts arose from some casual loss, he might upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off,<sup>g</sup> but he is no longer liable to this penalty.<sup>h</sup>

To deliver  
up all his  
property.

<sup>d</sup> 6 G. 4, c. 16, s. 38, 39; 5 & 6 Vict. c. 122, s. 32.

<sup>e</sup> Stat. 6 Geo. 4, c. 16, s. 12. By the law of Naples all fraudulent bankrupts, particularly such as did not surrender themselves within four days, were punished with death: also all who concealed the effects of a bankrupt, or

set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)

<sup>f</sup> 5 & 6 Vict. c. 122, s. 34. See also Public Wrongs, [156.]

<sup>g</sup> Stat. 21 Jac. 1, c. 19.

<sup>h</sup> 56 Geo. 3, c. 138.

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any person willfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit £100, and double the value of the estate concealed, to the creditors.<sup>i</sup>

Discovery of bankrupt's estate.

Hitherto everything is in favour of the creditors: and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For if the bankrupt hath made an ingenuous discovery, (of the truth and sufficiency of which there remains no reason to doubt,) and hath conformed in all points to the directions of the law; a public sitting may be appointed by the court for the allowance of a certificate, and at such sitting any of the creditors of the bankrupt may be heard against the allowance of the certificate, and the certificate may be refused or suspended as the court may see fit;<sup>k</sup> until recently the creditors, or four parts in five of them in number and value, (but none of them creditors for less than £20) or after six months three fourths in value, or nine tenths in number, must have signed the certificate, but now their consent is not necessary, but the court is to certify under hand and seal to the Court of Review, that the bankrupt has made a full discovery, and in all things conformed, and the bankrupt must swear that such certificate was obtained without fraud, when the Court of Review may confirm the same or disallow it, upon cause shown by any of the creditors of the bankrupt.<sup>l</sup>

Bankrupt's certificate.

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If no cause is shown to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a

Bankrupt's allowance.

<sup>i</sup> 6 Geo. 4, c. 16, s. 120.

<sup>k</sup> 5 & 6 Vict. c. 122, s. 39.

<sup>l</sup> 5 & 6 Vict. c. 122, s. 29; and see ss. 41, 42.

larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.*, and £300; but if the net produce of the estate shall pay ten shillings in the pound, he is to be allowed *five per cent.*, provided this shall not exceed £400; if twelve shillings and sixpence, then *seven and a half per cent.*, provided this shall not exceed £500; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*: provided that such allowance shall not exceed £600.<sup>m</sup>

And indemnity.

Besides this allowance, on his certificate being duly obtained, he has also an indemnity granted him of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that among other purposes, all proceedings on fiats of bankruptcy are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate properly allowed, shall be sufficient evidence of all previous proceedings.<sup>n</sup> Thus the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to these benefits, unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

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When certificate will not be allowed.

For no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before mentioned; and also, if any creditor produces a

<sup>m</sup> Stat. 6 Geo. 4, c. 16, s. 128. 5 & 6 Vict. c. 122, ss. 44, 45. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (*Ff.* 42, 3, 4.) But this did not extend to such allowance as was left to him on the score of compassion for the

maintenance of himself and family. *Si quid misericordie causa ei fuerit relictum, puta menstruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus est alimentis cotidianis.* (*Ibid.* l. 6.)

<sup>n</sup> Stat. 6 Geo. 4, c. 16, s. 128. 5 & 6 Vict. c. 122, ss. 37—42.



fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages.<sup>o</sup> Neither could he under sec. 12 of 5 Geo. II. claim them, if he had given with any of his children above £100, for a marriage portion, unless he had at that time sufficient left to pay all his debts; but this section has been repealed by 6 Geo. IV. c. 16; but if he has lost in any one day £20, or in the whole £200 within a twelvemonth before he became a bankrupt, by any manner of gaming or wagering whatsoever; or within the same time has lost to the value of £200 by stock-jobbing; or has concealed, destroyed his books, or made fraudulent entries in them, or permitted fictitious debts to be proved, he will not be entitled to his certificate.<sup>p</sup> Also to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission or fiat of bankruptcy, or have compounded with their creditors, or have been delivered by an act of insolvency: which we have already adverted to,<sup>q</sup> whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, before the Insolvent Debtors' Court; in which case their perjury or fraud may be, as in case of bankrupts, punished with transportation. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay full fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, (excepting their necessary apparel, household goods, and the tools and implements of their trades,) and is now vested in the assignees, who are authorized to seize it in like manner as they might have seised property of which such bankrupt was possessed at the issuing of the fiat against him.<sup>r</sup>

Insolvent  
debtors.

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<sup>o</sup> *Ibid.* s. 130.

<sup>q</sup> See *ante*, p. 334.

<sup>p</sup> Stat. 6 Geo. 4, c. 16, s. 130. 5 &  
6 Vict. c. 122, s. 38.

<sup>r</sup> Stat. 6 Geo. 4, c. 16, s. 127.

Thus much for the proceedings on a fiat of bankruptcy, so far as they affect the bankrupt himself personally. Let us next consider,

4. The estate and property of the bankrupt, how affected by his bankruptcy.

4. How such proceedings affect or transfer the *estate* and *property* of the bankrupt. The method whereby a *real* estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shown under its proper head in a former chapter.\* At present therefore we are only to consider the transfer of things *personal* by this operation of law.

Personal property vested in the assignees by virtue of their appointment.

By virtue of the statutes before-mentioned† all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual *possession*, or debts, contracts, and other choses in *action*; and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broke open, in order to enter upon and seize the same. When the assignees were chosen or approved by the creditors, the commissioners had until lately,‡ to assign everything over to them; but now this assignment is unnecessary, and the property of every part of the estate is by virtue of their appointment,§ as fully vested in them as it was in the bankrupt himself, and they have the same remedies to recover it.¶

To what property this extends.

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore it is usually said, that once a bankrupt, and always a bankrupt: by which is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be;‡ but that, if a commission or fiat is afterwards awarded, the commission or fiat and the property of the assignees shall have a relation, or reference [ 486 ] back to the first and original act of bankruptcy.¶ Inso- much that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the

\* Page 331.

† 6 Geo. 4, c. 16; 1 & 2 W. 4, c.

56.

‡ 6 Geo. 4, c. 16, ss. 63, 64.

¶ 1 & 2 W. 4, c. 56, ss. 25, 26.

‡ 12 Mod. 324.

¶ Salk. 110.

\* 4 Burr. 32.

alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. And no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors; but shall be paid rateably with the other creditors.<sup>a</sup> But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts;<sup>b</sup> for if, after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby.<sup>c</sup> In France this doctrine of relation was carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, was presumed to be fraudulent, and was therefore void.<sup>d</sup> But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 6 Geo. IV. c. 16, s. 82, that no money paid by a bankrupt to a *bonâ fide* or real creditor, before the issuing of the fiat, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by the same section, shall any debtor of a bankrupt, that pays him his debt before the issuing of the fiat, be liable to account for it again, provided the party by or to whom such payment was made had no notice of the act of bankruptcy. The intention of this relative power, being only to reach fraudulent transactions, and not to distress the fair trader. And by stat. 2 & 3 Vict. c. 29, it is further enacted, that all contracts, dealings, and transactions by and with any bankrupt, really and *bonâ fide* made and executed before the date and issuing of the fiat against him, shall be valid, notwithstanding any prior act

Payments  
and con-  
tracts by or  
to bank-  
rupts.

<sup>a</sup> 6 Geo. 4, c. 16, s. 108; 2 & 3 Vict. c. 29, s. 1.

<sup>b</sup> 1 Atk. 262.

<sup>c</sup> Vin. Abr. tit. *Creditor and Bankr.* 104; Eden. Bank. Law, 287.

<sup>d</sup> Sp. L. b. 29, c. 16

of bankruptcy, provided the person so dealing had no notice of such act.<sup>a</sup>

Remedies of assignees to recover bankrupt's property.

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority, but cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the Gazette.<sup>f</sup>

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Dividend.

Proof of debts.

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four and within twelve months after the fiat issued, give one and twenty days' notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made,<sup>g</sup> at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a rateable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission or fiat of bankruptcy reaches only the equity of redemption.<sup>h</sup> So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution, with the qualification already mentioned.<sup>i</sup> And, upon the equity of the statute 8 Ann. c. 14, (which directs, that, upon all executions of goods being on any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord) it was also held, that under a commission of bankruptcy, which is in the nature of a statute-execution, the landlord should be allowed his arrears of rent to the same amount in preference to other creditors, *even though he had neglected to distrain, while the goods remained on*

<sup>a</sup> And see *ante*, p. 333.

<sup>f</sup> Stat. 6 Geo. 4, c. 16, s. 88, re-enacting 5 Geo. 2, c. 30.

<sup>g</sup> 5 & 6 Vict. c. 122, s. 27.

<sup>h</sup> Finch. Rep. 466.

<sup>i</sup> See *ante*, p. 549; and 2 & 3 Vict. c. 29.

*the premises*; which he is otherwise entitled to do for his entire rent, be the *quantum* what it may;<sup>k</sup> and the law is thus laid down by Blackstone. But this was held to be a mistake by Lord Chancellor Bathurst, in a case<sup>l</sup> where the general question was, whether a landlord was entitled to have a year's rent paid him out of the effects of a bankrupt tenant, such effects having been seized under the commission and removed by the commissioners' messenger from the demised premises, in respect whereof the rent was in arrear, and the Lord Chancellor was clearly of opinion that the landlord could only come in as a common creditor. The landlord was at one time entitled to distrain for any quantity of rent in arrear, but now by s. 74 of the 6 Geo. IV., c. 16, no distress levied after an act of bankruptcy, whether before or after the commission, [or fiat,] shall be available for more than one year's rent, accrued prior to the commission, [or fiat,] but the landlord may come in as a creditor for the residue. But otherwise [ 488 ] judgments and recognizances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next in order,) these are all put on a level with debts by mere simple contract, and all paid *pari passu*.<sup>m</sup> Nay, so far is this matter carried, that, by the express provision of the statutes,<sup>n</sup> debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest,<sup>o</sup> allowing a discount or drawback in proportion. And insurances and obligations upon bottomry or *respondentia*, *bonâ fide* made by the bankrupt, though forfeited after the fiat is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy.<sup>p</sup> The clerks and servants of the bankrupt are so far favoured

<sup>k</sup> 1 Atk. 103, 104.

<sup>l</sup> *Ex parte Devine*, Co. B. L. 190; Eden, B. L. 804.

<sup>m</sup> Stat. 6 Geo. 4, c. 16, s. 108, re-enacting 21 Jac. c. 19.

<sup>n</sup> Stat. 6 Geo. 4, c. 16, s. 51, re-enacting 7 Geo. 1, c. 31.

<sup>o</sup> Lord Raym. 1549; Stra. 1211.

<sup>p</sup> Stat. 6 Geo. 4, c. 16, s. 53.

as that the court may allow them three months wages or salary, with liberty to prove for the residue.<sup>a</sup>

Final dividend.

Surplus to bankrupt.

Within eighteen months after the fiat issued, a second and final dividend shall be made, unless all the effects were exhausted by the first.<sup>c</sup> And if any surplus remains, after selling his estates and paying every creditor his full debt, and interest for the same, it shall be restored to the bankrupt.<sup>d</sup> This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditors will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satisfaction made to all the creditors, the fiat may be *superseded*.<sup>e</sup> This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a fiat to do them that justice which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the fiat, yet in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt,<sup>f</sup> or his representatives.

Title by insolvency.

XI. We may here also briefly mention the title by insolvency, which we have already alluded to with reference to real estate.<sup>g</sup> On the insolvency of any person within the acts before mentioned, the same effect follows as to his personal estate. By stat. 1 & 2 Vict. c. 110, all his personal estate and effects, except wearing apparel and other necessities of his person and family, not exceeding in the whole the value of 20*l.*, and all his future estate and effects, are vested in the provisional assignee. (s. 37). Assignees may be then appointed by the Court, and the personal estate and effects immediately vest in them, in trust for the benefit of the creditors of the insolvent (s. 45). The

<sup>a</sup> 5 & 6 Vict. c. 122, s. 28.

<sup>c</sup> Stat. 6 Geo. 4, c. 16, s. 139, re-enacting 5 Geo. 2, c. 80.

<sup>d</sup> Stat. 6 Geo. 4, c. 16, s. 132.

<sup>e</sup> 2 Cha. Cas. 144.

<sup>f</sup> 1 Atk. 244.

<sup>g</sup> See *ante*, pp. 334, 547.

debts are then to be ascertained, and a dividend to be made (s. 52.) The Court may, on due notice to the creditors, adjudge the prisoner to be discharged and entitled to the benefit of the act, as to the several debts due to the several persons mentioned in the schedule of the prisoner and as to the claims of all other persons not known to such prisoner at the time of the adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule (s. 75). The discharge of the prisoner may, in certain cases, where fraudulent conduct is proved against him, be delayed for three years from the time of the petition (ss. 76—78). But after discharge, no execution shall issue against the insolvent for debts to which the adjudication extends (s. 91).<sup>\*</sup>

<sup>\*</sup> See further as to insolvency, 5 & 6 Vict. c. 116, stated *ante*, 385, and as to the Insolvent Debtors' Court, see *Private Wrongs*, [87]; and as to the late alterations in the law of arrest, *ibid.* [289], [290].

## CHAPTER THE THIRTY-FOURTH.

### [ 489 ] OF TITLE BY TESTAMENT AND ADMINISTRATION.

Title by testament, and administration. THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, viz. by *testament* and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

Division of the chapter. XII, XIII. In the pursuit then of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, show who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, show what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

I. The original of testaments and administrations. First, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier: for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death in such persons as he shall name; and, in defect of such appointment or nomination, or where no nomination is

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permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons.<sup>a</sup> The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament*: the latter, which is also according to the will of the deceased, not expressed indeed, but presumed by the law,<sup>b</sup> we call in England an *administration*; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

Testaments are of very high antiquity. We find them in use among the ancient Hebrews; though I hardly think the example usually given,<sup>c</sup> of Abraham's complaining<sup>d</sup> that, unless he had some children of his body, his steward, Eliezer of Damascus, would be his heir, is quite conclusive to show that he had made him so by *will*. And indeed a learned writer<sup>e</sup> has adduced this very passage to prove, that in the patriarchal age, on failure of children or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law.<sup>f</sup> But, (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world,<sup>g</sup>) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings,<sup>h</sup> wherein Jacob bequeaths to his son Joseph a portion of his inheritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens;<sup>i</sup> but in many other parts of Greece they were totally discountenanced.<sup>k</sup> In Rome they

The history  
of testa-  
ments.

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<sup>a</sup> Puff. L. of N. b. 4, c. 10.

<sup>b</sup> *Ibid.* b. 4. c. 11.

<sup>c</sup> Barbeyr. Puff. 4, 10, 4, Godolph.

Orph. Leg. 1, 1.

<sup>d</sup> Gen. c. 15.

<sup>e</sup> Taylor's Elem. Civ. Law, 517.

<sup>f</sup> See p. 11.

<sup>g</sup> Selden. *de succ. Ebr.* c. 24.

<sup>h</sup> Gen. c. 48.

<sup>i</sup> Plutarch. *in vita Solon.*

<sup>k</sup> Pott. *Antiq. l. 4, c. 15.*

were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing:<sup>1</sup> and, among the northern nations, particularly among the Germans,<sup>m</sup> testaments were not received into use. And this variety may serve to evince, that the right of making wills and disposing of property after death, is merely a creature of the civil state:<sup>n</sup> which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven.<sup>o</sup>

The power to bequeath is, in England, co-eval with the first rudiments of the law.

With us in England this power of bequeathing is co-eval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur heredi nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuantur.*"<sup>p</sup> But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us,<sup>q</sup> that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or issue, the whole was at his own disposal.<sup>r</sup> The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them.<sup>s</sup>

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To what it extended.

<sup>1</sup> Inst. 2, 22, 1.

<sup>m</sup> Tacit. *de mor. Germ.* 21.

<sup>n</sup> See p. 12.

<sup>o</sup> Sp. L. b. 27, c. 1. Vinnius *in* 57.

Inst. l. 2, tit. 10.

<sup>p</sup> LL. *Cannt.* c. 68.

<sup>q</sup> l. 2, c. 5.

<sup>r</sup> Bracton, l. 2, §. 26. Flet. l. 2, c.

<sup>s</sup> F. N. B. 122.

This continued to be the law of the land at the time of *magna carta*, which provides that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased: and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; solvis uxori ipsius et pueris suis rationabilibus partibus suis.*" In the reign of king Edward the Third this right of the wife and children was still held to be the universal or common law;<sup>†</sup> though frequently pleaded as the local custom of Berks, Devon, and other counties:<sup>‡</sup> and Sir Henry Finch lays it down expressly,<sup>§</sup> in the reign of Charles the First, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed Sir Edward Coke<sup>¶</sup> is of opinion, that this never was the general law, but only obtained in particular places by special custom: and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton<sup>\*</sup> lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland.<sup>‡</sup>

All the goods and chattels may be now bequeathed by will.

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\* 9 Hen. 3, c. 18.

† A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliæ hæcenus unitatem et approbatam, uxores debent et solent a tempore, &c., habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et, si habuerint, tunc tertiam partem, &c.*: and that her husband died worth 20,000 marks, without issue had between them; and thereupon she claimed the

moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed. (*M. 30 Edw. 3, 25.*) And a similar case occurs in *H. 17 Edw. 3, 9.*

‡ *Reg. Brev.* 142. *Co. Litt.* 176.

§ *Law.* 175.

¶ 2 *Inst.* 33.

\* 1. 2, c. 26, s. 2.

‡ Dalrymp. of Feud. Property. 145.

To which we may add, that, whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times : when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided ; the one 4 & 5 W. & M. c. 2, explained by 2 & 3 Ann. c. 5, for the province of York ; another 7 & 8 W. III. c. 38, for Wales ; and a third, 11 Geo. I. c. 11, for London : whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of *all* their personal estates by will ; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may bequeath the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter<sup>y</sup>) to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries ; and afterwards he was left at his own liberty to bequeath the remainder as he pleased.

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Where no disposition is made of the goods and chattels.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate ; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom.<sup>a</sup> This prerogative the king continued to exercise for some time by his own ministers of justice ; and probably in the county court, where matters of all kinds were determined : and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition.<sup>a</sup> Afterwards the crown, in favour of the church, invested the

<sup>y</sup> Page 483.

<sup>a</sup> 9 Rep. 38.

<sup>a</sup> *Ibid.* 37.

prelates with this branch of the prerogative; which was done, saith Perkins,<sup>b</sup> because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money in *pious usus*: and, if he did otherwise, he broke the confidence which the law reposed in him.<sup>c</sup> So that properly the whole interest and power, which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious.<sup>d</sup> And, as he had thus the disposition of intestates' effects, the probate of wills of course followed; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

They were vested in the clergy to be disposed of in *pious usus*.

The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct.<sup>e</sup> But even in Fleta's time it was complained,<sup>f</sup> "*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes, nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV.<sup>g</sup> written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*" Thus the popish clergy took to themselves<sup>h</sup> (under the

<sup>b</sup> s. 486.

<sup>c</sup> Finch. Law. 173, 174.

<sup>d</sup> Plowd. 277.

<sup>e</sup> *Ibid.*

<sup>f</sup> l. 2, c. 57, s. 10.

<sup>g</sup> *In Decretal.* l. 5, t. 3, c. 42.

<sup>h</sup> The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bulle, A.D. 1254. (*Regist. honoris*

By stat. Westm. 2, the ordinary was bound to pay the debts of the intestate.

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By 31 Edw. III. the nearest friends of the deceased shall administer his goods.

By 21 Hen. VIII. the stat. of Edward is extended.

name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted ; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westminster 2,<sup>1</sup> that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will : a use more truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands : yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents : and therefore the statute 31 Edw. III. c. 11, provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods ; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand ; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate ; who is interpreted<sup>2</sup> to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge ; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion ; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

*de Richm.* 101,) and was observed till abolished by the statute 28 Hen. 8, c. 15.

<sup>1</sup> 13 Edw. 1, c. 19.

<sup>2</sup> 9 Rep. 39.

Upon this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to shew the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

On this footing stands the law of administrations.

I proceed now, *secondly*, to inquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate. And this law<sup>k</sup> is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three accounts; for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

II. Who may make a testament.

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1. In the first species are to be reckoned infants, who however, until lately, if of the age of fourteen if males, and twelve if females, might make a testament; which is the rule of the civil law.<sup>l</sup> Indeed, some of our common lawyers have held that an infant of any age (even four years old) might make a testament,<sup>m</sup> and others have denied that under eighteen he is capable,<sup>n</sup> yet as the Ecclesiastical Court is the judge of every testator's capacity, this case was governed by the rules of the ecclesiastical law. So that no objection could, until very recently, be admitted to the will of an infant of fourteen, merely for want of age. However, by the late Wills Act, statute 1 Vict. c. 26, ss. 7 and 34, it is enacted, that no will made after the first day of January, 1838, by any person under the age of twenty-one years, shall be valid. But, if the testator was not of sufficient discretion, whether at the

1. Persons not having discretion. Infants.

<sup>k</sup> Godolph. Orph. Leg. p. 1, c. 7.

<sup>m</sup> Perkins, s. 503.

<sup>l</sup> Godolph. p. 1, c. 8. Wentw. 212;

<sup>n</sup> Co. Litt. 89.

2 Vern. 104, 469; Gilb. Rep. 74.

age of fourteen or four-and-twenty, that, at whatever time the will may have been made, will overthrow his testament.

**Madmen, &c.** Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or disorder, such as have their senses besotted with drunkenness—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animus testandi*, and their testaments are therefore void.

2. Persons  
not having  
their liberty.

2. Such persons as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like.<sup>a</sup> But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animus testandi*. And with regard to feme-coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole.<sup>o</sup>

Married  
women.

[ 498 ] But with us a married woman is not only utterly incapable of devising *lands*, being excepted out of the statute of wills 34 and 35 Hen. VIII., c. 5, but also she is incapable of making a testament of *chattels*, without the license of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would therefore be extremely inconsistent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another.<sup>p</sup> Yet by her husband's license she may make a testament;<sup>q</sup> and the husband, upon marriage, frequently covenants with her friends to allow her that licence: but such licence is more properly his assent; for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand

<sup>a</sup> Godolph. p. 1, c. 9.

<sup>o</sup> Ff. 31, 1, 77.

<sup>p</sup> 4 Rep. 51.

<sup>q</sup> Dr. & St. d. 1, c. 7.



hath given her permission to make a will.' Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed.\* So that in reality the woman makes no will at all, but only something like a will;† operating in the nature of an appointment, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law; for though a son who was in *potestate parentis*, could not by any means make a formal and legal testament, even though his father permitted it,‡ yet he might, with the like permission of his father, make what was called a *donatio mortis causa*.§ The queen consort is an exception to this general rule, for she may dispose of her chattels by will, without the consent of her lord:¶ and any feme-covert may make her will of goods, which are in her possession in *auter droit*, as executrix or administratrix; for these can never be the property of the husband:‡ and, if she has any pinmoney or separate maintenance, it is said she may dispose of her savings thereof by testament, without the control of her husband.‡ But, if a feme-sole [ 499 ] makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will.\* The recent act leaves the wills of married women precisely as they were before it came into operation.‡

8. Persons incapable of making testaments, on account of their criminal conduct, are in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture.<sup>b</sup> Out-

\* Bro. Abr. tit. *Devise*, 34; Stra. 891.

† *The King v. Bettesworth*, T. 13 Geo. 2, B. R.

‡ Cro. Car. 376; 1 Mod. 211.

§ Fl. 28, 1, 6.

¶ Fl. 30, 6, 25.

¶ Co. Litt. 133.

‡ Godolph. 1, 10.

‡ Prec. Chan. 44. See *ante*, p. 493.

‡ 4 Rep. 60; 2 P. Wms. 624.

‡ 1 Vict. c. 26, s. 8.

<sup>b</sup> Plowd. 261.

laws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time.<sup>c</sup> As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others of a worse stamp,) by the common law their testaments may be good.<sup>d</sup> And in general the rule is, and has been so at least ever since Glanvil's time, *quod libera sit cujuscunque ultima voluntas*.

III. The nature and incidents of a will.

Let us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make; or, what are the nature and incidents of a testament. Testaments, both Justinian<sup>e</sup> and Sir Edward Coke<sup>f</sup> agree to be so called, because they are *testatio mentis*: an etymon, which seems to savour too much of the conceit; it being plainly a substantive derived from the verb *testari*, in like manner as *juramentum*, *incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit*:"<sup>h</sup> which may be thus rendered into English, "the legal declaration of a man's intentions, which he wills to be performed after his death." It is called *sententia* to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his *will*: it is *justa sententia*; that is, drawn, attested, and published with all due solemnities and forms of law: it is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

Testaments were divided into written and nuncupative.

These testaments were divided into two sorts; *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depended merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing,

Codleft.

<sup>c</sup> Fitzh. Abr. tit. *Descent*, 16.

<sup>d</sup> Godolph. p. 1, c. 12.

<sup>e</sup> L. 7, c. 5.

<sup>f</sup> Inst. 2, 10.

<sup>g</sup> 1 Inst. 111, 322.

<sup>h</sup> Ff. 28, 1, 1.

is a supplement to a will ; or an addition made by the testator, and annexed to, and to be taken as part of, a testament : being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator.<sup>1</sup> This might also be either written or nuncupative.

But, as *nuncupative* wills and codicils, (which have Requisites of nuncupative wills. fallen into disuse since the art of writing has become more universal,) were liable to great impositions, and might occasion many perjuries, the statute of frauds, 29 Car. II. c. 3, laid them under many restrictions ; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacted, 1. That no written will should be revoked or altered by a subsequent nuncupative one, except the same were in the lifetime of the testator reduced to writing, and read over to him, and approved ; and unless the same were proved to have been so done by the oaths of three witnesses at the least ; who, by statute 4 & 5 Ann. c. 16, must be such as are admissible upon trials at common law. 2. That no nuncupative will should in any wise be good, where the estate bequeathed exceeded £30 ; unless proved by three such witnesses, present at the making thereof, (the Roman law requiring seven<sup>1</sup>) and unless they or some of them were specially required to bear witness thereto by the testator himself ; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he were surprised with sickness on a journey, or from home, and died without returning to his dwelling. 3. That no nuncupative will should be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor could it be proved till fourteen days after the death of the testator, nor till process had first issued to call in the widow, or next of kin, to contest it, if they thought proper. Thus the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself fell into disuse ; and is hardly ever heard of, but in the only instance where favour ought to be shown to it, when the testator was surprised

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<sup>1</sup> Godolph. p. 1, c. 1, s. 3.<sup>1</sup> Inst. 2, 10, 4.

by sudden and violent sickness. The testamentary words must have been spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must have required the by-standers to bear witness of such his intention: the will must have been made at home, or among his family or friends, unless by unavoidable accident, to prevent impositions from strangers: it must have been in his *last* sickness; for, if he recovered, he might have altered his dispositions, and had time to make a written will: it could not have been proved at too long a distance from the testator's death, lest the words should have escaped the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should have been put to inconvenience, or surprised. But nuncupative wills, if made after the 1st of January, 1838, are not longer valid at all, for by the wills act, 1 Vict. c. 26, s. 9, the 29 Car. II. c. 3, is repealed to this extent, and it is enacted that no will shall be valid unless it shall be in writing; but by s. 9, the wills of soldiers and mariners, being in actual military service or at sea, may dispose of their personal estate as they might have done before the act; and by s. 12, the act is not to affect certain provisions of stat. 11 Geo. IV. and 1 W. IV. c. 60, with respect to the wills of petty officers and seamen of the royal navy and marines, so far as relates to their wages, prize-money or allowances.

Requisites of  
written wills.

As to *written* wills, they needed not until lately any witnesses of their publication. I speak not here of devises of lands, which were quite of a different nature; being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testament. But a testament of chattels, written in the testator's own hand, though it had neither his name nor seal to it, nor witnesses present at its publication, was good; provided sufficient proof could be had that it was his handwriting.<sup>k</sup> And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions, and approved by him, it was held a good testament of the personal estate.<sup>l</sup> Yet it was always the safer and more prudent way, and left less in the

<sup>k</sup> Godolph. p. 1, c. 21; Gilb. Rep. 260.

<sup>l</sup> Comyns, 452, 3, 4.

breast of the ecclesiastical judge, if it was signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton;<sup>a</sup> or, rather, he in this respect implicitly copied the rule of the civil law. But this distinction between wills of real and personal estate is now entirely abolished, so far as it relates to wills made after the 1st of January, 1838, for by s. 9 of stat. 1 Vict. c. 26, it is enacted that no will shall be valid, unless it shall be signed at the foot by the testator or by some other person in his presence or by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary, and by s. 13, any will executed in this manner shall be valid without any other publication.<sup>o</sup>

No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est: et voluntas testatoris est ambulatoria usque ad mortem.*"<sup>p</sup> And therefore, if there be many testaments, the last overthrows all the former:<sup>q</sup> but the republication of a former will revokes one of a later date, and establishes the first again.<sup>r</sup>

No testament of effect until the death of testator.

Hence it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of the incapacities before mentioned; 2. By making another testament of a later date: and, 3. By cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in its own nature revocable.<sup>s</sup> For this, saith Lord Bacon,<sup>t</sup> would be for a man to deprive himself of that, which of all other things is most incident to human condition; and

How testaments may be avoided.

<sup>a</sup> L. 2, c. 26.

<sup>o</sup> And see the provisions of 1 Vict. c. 26, as to the witnesses, *ante*, p. 432, which relate also to testaments of personal estate.

<sup>p</sup> Co. Litt. 112.

<sup>q</sup> Litt. s. 168. Perk. 478.

<sup>r</sup> Perk. 479. See 1 Vict. c. 26, s. 24, and *ante*, p. 432.

<sup>s</sup> 8 Rep. 82.

<sup>t</sup> Elem. c. 19.

that is, alteration or repentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy.<sup>a</sup> But by 1 Vict. c. 26, s. 19, no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances; it is however expressly provided (s. 18), that a will shall be revoked by marriage; but that no will shall be revoked otherwise, or but by another will or codicil executed in the manner hereinbefore mentioned, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, with the intention of revoking the same; and by s. 21, no alteration in a will shall have any effect unless executed as a will; and by s. 22, no will revoked shall be revived otherwise than by re-execution or a codicil to revive it. The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason)<sup>b</sup> any of the children of the testator.<sup>c</sup> But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficioci testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficioci*, to set aside such a testament.

IV. Executor  
and adminis-  
trator, how  
appointed.

We are next to consider, *fourthly*, what is an executor, and what an administrator: and how they are both to be appointed.

An executor is he to whom another man commits by

<sup>a</sup> Lord Raym. 441; 1 P. Wms. 204.

<sup>b</sup> See Rights of Persons, ch. 16.

<sup>c</sup> Inst. 2, 18, 1.

will the execution of that his last will and testament. And all persons are capable of being executors that are capable of making wills, and many others besides; as feme coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors.<sup>a</sup> But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore etate*.<sup>f</sup> And where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall see fit, until such infant shall have attained the full age of twenty-one years. In like manner as it may be granted *durante absentia* or *pendente lite*: when the executor is out of the realm,<sup>g</sup> or when a suit is commenced in the ecclesiastical court touching the validity of the will.<sup>h</sup> This appointment of an executor is essential to the making of a will:<sup>b</sup> and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must grant administration *cum testamento annexo*<sup>c</sup> to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore etate*, &c. of another, is very little different from that of an executor. And this was law so early as the reign of Henry II.; when Glanvil<sup>d</sup> informs us, that “*testamenti executores esse debent ii quos testator ad hoc elegerit, et quibus curam ipse commiserit: si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*”

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statute of Edward the Third and Henry the Eighth, before-mentioned, direct. In conse-

When general letters of administration are granted.

<sup>a</sup> West. Symb. p. 1, s. 635.

<sup>f</sup> West. Off. Ex. c. 18.

<sup>g</sup> 1 Lutw. 342.

<sup>h</sup> 2 P. Wms. 589, 590.

<sup>b</sup> Went. c. 1. Plowd. 281.

<sup>c</sup> 1 Roll. Abr. 907; Comb. 20.

<sup>d</sup> L. 7, c. 6.

quence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband, or his representatives:<sup>a</sup> and of the husband's effects to the widow, or next of kin; but he may grant it to either, or both, at his discretion.<sup>f</sup> 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases.<sup>g</sup> 3. That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians;<sup>h</sup> and not of the canonists, which the law of England adopts in the descent of real estate:<sup>i</sup> because in the civil computation the intestate himself is the *terminus*, *a quo* the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration: both which are indeed in the first degree; but with us<sup>j</sup> the children are allowed the preference.<sup>k</sup> Then follow brothers,<sup>l</sup> grandfathers,<sup>m</sup> uncles or nephews,<sup>n</sup> (and the females of each class respectively,) and lastly cousins. 4. The half blood is admitted to the administration as well as the whole: for they are of the kindred of the intestate, and were<sup>o</sup> only excluded from inheritances of land upon feudal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood;<sup>p</sup> and the ordinary may grant administration to the sister of the half, or the brother of the whole blood,

<sup>a</sup> Cro. Car. 106; Stat. 29, Car. 2, c. 3; 1 P. Wms. 381.

<sup>f</sup> 1 Salk. 36. Stra. 532.

<sup>g</sup> See page 532.

<sup>h</sup> Prec. Chanc. 593.

<sup>i</sup> See p. 244.

<sup>j</sup> Godolph. p. 2, c. 34, s. 1; 2 Vern. 125.

<sup>k</sup> In Germany there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet

of Arensburg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory; and so the law was established in their favour, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. Mod. Un. Hist. xxix. 28.

<sup>l</sup> Harris in Nov. 118, c. 2.

<sup>m</sup> Prec. Chanc. 527; 1 P. Wms. 41.

<sup>n</sup> Atk. 455.

<sup>o</sup> See *ante*, p. 265.

<sup>p</sup> 1 Ventr. 425.



at his own discretion.<sup>o</sup> 5. If none of the kindred will take out administration, a creditor may, by custom, do it.<sup>p</sup> 6. If the executor refuses or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin.<sup>q</sup> 7. And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done<sup>r</sup> before the statute of Edward III.) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody,<sup>s</sup> and to do other acts for the benefit of such as are entitled to the property of the deceased.<sup>t</sup> If a bastard, who has no kindred, being *nullus filius*, or any one else that has no kindred, dies intestate, and without wife or child, it had formerly been held<sup>u</sup> that the ordinary might seize his goods, and dispose of them *in pios usus*. But the usual course now is for some one to procure letters patent, or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown.<sup>v</sup> [ 506 ]

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself;<sup>w</sup> but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A.<sup>x</sup> For the power of an executor is founded upon the special confidence and actual appointment of the deceased: and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A., is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore on the death of that officer, it results back to the ordinary to appoint another. And with regard to

The interest of executor and administrator, how kept up.

<sup>o</sup> Aleyn. 36; Styl. 74.

<sup>p</sup> Salk. 38.

<sup>q</sup> 1 Sid. 281; 1 Ventr. 219.

<sup>r</sup> Plowd. 278.

<sup>s</sup> Went. ch. 14.

<sup>t</sup> 2 Inst. 398.

<sup>u</sup> Salk. 37.

<sup>v</sup> 3 P. Wms. 33.

<sup>w</sup> Stat. 25 Edw. 3, st. 5, c. 5, 1 Leon. 275.

<sup>x</sup> Bro. Abr. tit. *Administrator*, 7

the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one in administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property.<sup>7</sup> But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years and the like; the rest being committed to others.\*

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V. Office and duties of executors and administrators.

Having thus shown what is, and who may be, an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators: excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will,<sup>a</sup> but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate,<sup>b</sup> the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor without any just authority, (as by intermeddling with the goods of the deceased,<sup>c</sup> and many other transactions,<sup>d</sup>) he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling, as will charge a man

<sup>7</sup> Styl. 225.

<sup>a</sup> 1 Roll. Abr. 908; Godolph. p. 2, c. 30; Salk. 36.

<sup>b</sup> Wentw. cc. 3.

<sup>b</sup> Comyns, 151.

<sup>c</sup> 5 Rep. 33, 34.

<sup>d</sup> Wentw. ch. 14, Stat. 43 Eliz. c. 8.

as executor of his own wrong.<sup>e</sup> Such a one cannot bring an action himself in right of the deceased,<sup>f</sup> but actions may be brought against him. And, in all actions by creditors, against such an officious intruder, he shall be named an executor, generally;<sup>g</sup> for the most obvious conclusion which strangers can form from his conduct, is that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof.<sup>h</sup> He is chargeable with the debts of the deceased, so far as assets come to his hands:<sup>i</sup> and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree,<sup>j</sup> himself only excepted.<sup>k</sup> And [ 508 ] though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages;<sup>l</sup> unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt.<sup>m</sup> But let us now see what are the power and duty of a rightful executor or administrator.

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.<sup>n</sup>

2. The executor, or the administrator *durante minore ætate*, or *durante absentia*, or *cum testamento annexo*, must *prove the will* of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate: or *per testes*, in more solemn form of law, in case the validity of the will be disputed.<sup>o</sup> When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and de-

1. To bury the deceased

2. To prove the will;

<sup>e</sup> Dyer, 166.

<sup>f</sup> Bro. Abr. t. *Administrator*, 8.

<sup>g</sup> 5 Rep. 31.

<sup>h</sup> 12 Mod. 471.

<sup>i</sup> Dyer, 166.

<sup>j</sup> 1 Chan. Cas. 33.

<sup>k</sup> 5 Rep. 30; Moor. 527.

<sup>l</sup> 12 Mod. 441, 471.

<sup>m</sup> Wentw. ch. 14.

<sup>n</sup> Salk. 196; Godolph. p. 2, c. 26,

s. 2.

<sup>o</sup> Godolph. p. 1, c. 20, s. 4.

or take out  
letters of ad-  
ministration.

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livered to the executor or administrator, together with a certificate of its having been proved before him : all which together is usually styled the *probate*. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary ; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him : and he must, by statute 22 and 23 Car. II. c. 10, enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones : but if the deceased had *bona notabilia*, or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative ;<sup>p</sup> whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to archbishop Chichele, interprets these hundred shillings to signify *solidos legales* ; of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles or £16 13s. 4d. He therefore computes<sup>q</sup> that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to £23 3s. 0½d. This will account for what is said in our ancient books, that *bona notabilia* in the diocese of London,<sup>r</sup> and indeed everywhere else,<sup>s</sup> were of the value of ten pounds by *composition* : for, if we pursue the calculations of Lyndewode to their full extent, and consider that a pound of gold is now almost equal in value to an hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly £70. But the makers of the canons of 1603 understood this ancient rule to be meant of the shillings current in the reign of James I. and have therefore di-

<sup>p</sup> 4 Inst. 335.

<sup>q</sup> *Provin.* l. 3, t. 13, c. *item v. centum, &c., statutum v. laicis.*

<sup>r</sup> 4 Inst. 335; Godolph. p. 2, c. 22.

<sup>s</sup> Plowd. 281.

rected<sup>t</sup> that five pounds shall for the future be the stand-<sup>is now the standard</sup> ard of bona notabilia, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation: that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had bona notabilia; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates, that have large and diffusive property in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects. [ 510 ]

3. The executor or administrator is to make an *inventory*<sup>3. To make an inventory.</sup> of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law: being the representative of the deceased,<sup>4. To collect the goods.</sup> and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good

<sup>t</sup> Can. 92.<sup>3</sup> Stat. 24 Hen. 8, c. 5.<sup>w</sup> Co. Litt. 209.

against all the rest :<sup>v</sup> although in case of administrators it was otherwise,<sup>w</sup> but now the same rule<sup>x</sup> obtains with respect to them. Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator;<sup>y</sup> that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such [ 511 ] goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him : which is the next thing to be considered ; for,

5. To pay the debts of the deceased.

5. The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority ; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty.<sup>a</sup> Thirdly, such debts as are by particular statutes to be preferred to all others : as money due upon poor's rates, as overseer of the poor,<sup>b</sup> for letters to the post-office,<sup>b</sup> and some others. Fourthly, debts of record ; as judgments (docketted according to the statute 4 & 5 W. & M. c. 20, and 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82,) statutes, and recognizances,<sup>c</sup> and decrees in equity under the latter statute.<sup>d</sup> Fifthly, debts due on special contracts : as for rent (for which the lessor has often a better remedy in his own hands, by distraining) or upon bonds, covenants, and the like, under seal.<sup>e</sup> Lastly, debts on simple contracts, *viz.*, upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some<sup>f</sup> with reason preferred to any other ; and so stood the ancient law, according to Bracton<sup>g</sup> and Fleta,<sup>h</sup>

<sup>v</sup> Dyer, 23.

<sup>w</sup> 1 Atk. 460.

<sup>b</sup> Stat. 9 Ann. c. 10.

<sup>x</sup> *Welland v. Fenn*, cit. 2 Ves. sen. 267 ; Selw. N. P. 767.

<sup>c</sup> 1 & 2 Vict. c. 110, s. 18 ; and see *Mason v. Williams*, 2 Salk. 507. See

<sup>y</sup> See page 285.

also 2 Vict. c. 11, and Private Wrongs, ch. 25.

<sup>a</sup> 1 And. 129.

<sup>b</sup> Stat. 17 Geo. 2, c. 38. The stat. 30 Car. 2, st. 1. c. 3, enacting a forfeiture for not burying in woollen, and given as an example by Blackstone, is repealed by 54 G. 3, c. 108.

<sup>d</sup> See 4 Rep. 60 ; Cro. Car. 363.

<sup>e</sup> Wentw. ch. 12.

<sup>f</sup> 1 Roll. Abr. 927.

<sup>g</sup> L. 2, c. 26.

<sup>h</sup> L. 2, c. 56, s. 10.

who reckon, among the first debts to be paid, *servitia servientium et stipendia famulorum*. By stat. 3 & 4 W. IV., c. 104, freehold and copyhold estates are now made assets for the payment of simple contract debts; but it is provided that in the administration of assets by courts of equity, all creditors by specialty in which the heirs are bound, shall be paid the full amount of their debts before any of the creditors by simple contract, or by specialty in which the heirs are not bound. Among debts of equal degree the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to.<sup>1</sup> But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law.<sup>1</sup> If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no;<sup>k</sup> provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary.<sup>1</sup> Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.<sup>m</sup> [ 512 ]

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts.<sup>n</sup> 6. To pay legacies.

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, and some others.<sup>o</sup> This bequest transfers an Legacy,

<sup>1</sup> 10 Mod. 496; See Private Wrongs, ch. 2.

<sup>j</sup> 5 Rep. 30.

<sup>k</sup> Plowd. 184; Salk. 299.

<sup>1</sup> Salk. 303; 1 Roll. Abr. 921.

<sup>m</sup> Dyer, 32; 2 Leon. 60.

<sup>n</sup> 2 Vern. 434; 2 P. Wms. 25.

<sup>o</sup> Papists were formerly disabled; see *ante*, 300, and Rights of Persons pp. [103], [451].

general,  
specific,

[ 513 ]

inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor.<sup>p</sup> For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law,<sup>1</sup> “*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis.*” And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it.<sup>r</sup> Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid.<sup>s</sup> And this law is as old as Bracton and Fleta, who tell us,<sup>t</sup> “*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio.*”

lapsed,

vested and  
contingent.

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one; as *when* he attains, or *if* he attains, the age of twenty-one; and he dies before that time; it is a lapsed legacy.<sup>u</sup> But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsentî*, although it be *solvendum in futuro*: and, if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil

<sup>p</sup> Co. Litt. 111; Aleyn. 39.

<sup>q</sup> L. 2, c. 26.

<sup>r</sup> 2 Vern. 111.

<sup>s</sup> *Ibid.* 205.

<sup>t</sup> Bract. l. 2, c. 26; Flet. l. 2, c. 57, s. 11.

<sup>u</sup> Dyer, 59; Equ. Cas. Abr. 995.



law; and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the Chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court be sued.\* But if such legacies be charged upon a real estate, in both cases, they shall lapse for the benefit of the heir;† for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator.‡ It should be observed, that by stat. 1 Vict. c. 26, s. 33, gifts to children or other issue, who leave issue living at the testator's death, shall not lapse unless a contrary intention appear by the will. [ 514 ]

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a *donatio causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker,) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa*.§ This method of donation might have subsisted in a state of nature, being always accompanied with

*Donatio  
causa mortis.*

\* Pf. 35, 1, 1 & 2.

† 1 Equ. Cas. Abr. 295.

‡ 2 P. Wms. 601.

§ 2 P. Wms. 26, 27.

\* Prec. Chan. 269; 1 P. Wms. 406, 441. 3 P. Wms. 357.

delivery of actual possession;<sup>a</sup> and so far differs from a testamentary disposition : but seems to have been handed to us from the civil lawyers,<sup>b</sup> who themselves borrowed it from the Greeks.<sup>c</sup>

7. To pay the residue to the residuary legatee.

7. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will ; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship.<sup>d</sup> But whatever ground there might have been formerly for this opinion, it has been recently understood<sup>e</sup> with this restriction ; that although where the executor had no legacy at all, the *residuum* should in general be his own, yet wherever there was sufficient on the face of a will, (by means of a competent legacy or otherwise,) to imply that the testator intended his executor should *not* have the residue, the undivided surplus of the estate should go to the next of kin ; and it is now expressly enacted by stat. 1 W. IV., c. 40, s. 1, that when any person shall die after the 1st day of September, 1830, his executors shall be deemed to be trustees for any person entitled to any residue under the statute of distributions, unless otherwise directed by the will ; but by s. 2, this is not to affect the rights of executors when there is not any person entitled to the residue. Where, therefore, there is no direction in the will that the executor shall retain the residue, the executor now stands upon exactly the same footing as an administrator : concerning whom indeed there formerly was much debate,<sup>f</sup> whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the

[ 515 ]

Where the executor is entitled to the residue, and where the next of kin.

<sup>a</sup> Law of Forfeit. 16.

<sup>b</sup> Inst. 2, 7, 1 ; Ff. l. 89, t. 6.

<sup>c</sup> There is a very complete *donatio mortis causa*, in the *Odyssy*, b. 17, v. 78, made by Telemachus to his friend, Piræus ; and another by Hercules, in the *Alcestes* of Euripides, v. 1020.

<sup>d</sup> Perkins, 525.

<sup>e</sup> Prec. Chanc. 323 ; 1 P. Wms. 7, 544 ; 2 P. Wms. 338 ; 3 P. Wms. 43, 194 ; Stra. 559 ; *Lawson v. Lawson*, Dom. Proc. 28 Apl. 1777.

<sup>f</sup> Godolph. p. 2, c. 32.

deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law.<sup>8</sup> And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the statute 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 30, it is enacted, that the surplusage of intestates' estates, (except of *femes covert*, which are left as at common law,<sup>h</sup>) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters.<sup>i</sup> The next of kindred, here referred to, are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration; of whom we have sufficiently spoken. And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she

Statutes of  
distribution,  
22 & 23 Car.  
II. c. 10, and  
29 Car. II.  
c. 30.

<sup>8</sup> 1 Lev. 283; Cart. 125; 2 P. Wms. 447.

<sup>i</sup> Raym. 496; Lord Raym. 571.

<sup>j</sup> Page 569.

<sup>h</sup> Stat. 29 Car. 2, c. 30, s. 25.

Observations  
on them.

and each of the remaining children, or their representatives, shall divide his effects in equal portions.<sup>k</sup>

It is obvious to observe, how near a resemblance this

<sup>k</sup> The following table, illustrative of the statutes of distributions, may be found useful :—

<i>If the Intestate dies, leaving</i>	<i>His personal representatives take as follows :</i>
Wife and child, or children - -	One-third to wife, rest to child or children; and if the children are dead, then to their representatives (that is, their lineal descendants) except such child or children, not heirs at law, who had estate by settlement of intestate in his lifetime, equal to other shares - - -
Wife only - - - - -	Half to wife, rest to next of kin in equal degrees to intestate, or their legal representatives.
No wife or child - - - - -	All to next of kin and to their legal representatives.
Child, children, or representatives of them - - - - -	All to him, her, or them.
Children by two wives - - -	Equally to all.
If no child, children, or representatives of them - - - - -	All to next of kin in equal degree to intestate.
Child and grandchild - - - -	Half to child, half to grandchild, who takes by representation.
Husband - - - - -	Whole to him.
Father, and brother or sister - -	Whole to father.
Mother, and brother or sister - -	Whole to them equally.
Wife, mother, brother, sisters, and nieces	Half to wife, residue to mother, brothers, sisters, and nieces.
Wife, mother, nephews, and nieces -	Two-fourths to wife, one-fourth to mother, and other fourth to nephews and nieces.
Wife, brothers or sisters, and mother -	Half to wife (under stat. of Car. 2), half to brothers or sisters, and mother.
Mother only - - - - -	The whole (it being then out of the statute of 1 Jac. 2, c. 17). <sup>*</sup>
Wife and mother - - - - -	Half to wife, half to mother.
Brother or sister of whole blood, and brother or sister of half blood - -	Equally to both

<sup>\*</sup> By this statute, a. 7, "If after the death of a father, any of his children shall die intestate without wife or children in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her."

statute of distributions bears to our ancient English law, *de rationabili parte bonorum*, spoken of at the beginning of this chapter;<sup>\*</sup> and which Sir Edward Coke<sup>1</sup> himself, though he doubted the generality of its restraint on the

Posthumous brother or sister, and mother . . . . .	Equally to both.
Posthumous brother or sister, and brother or sister born in lifetime of father . . . . .	Equally to both.
Father's father, and mother's mother . . . . .	Equally to both.
Uncle or aunt's children, and brother or sister's grandchildren . . . . .	Equally to both.
Grandmother, uncle or aunt . . . . .	All to grandmother.
Two aunts, nephew, and niece . . . . .	Equally to all.
Uncle and deceased uncle's child . . . . .	All to uncle.
Uncle, by mother's side, and deceased uncle or aunt's child . . . . .	All to uncle.
Nephew by brother, and nephew by half-sister . . . . .	Equally <i>per capita</i> .
Brother or sister's nephew or nieces . . . . .	Where nephews and nieces taking <i>per stirpes</i> , and not <i>per capita</i> .
Nephew by deceased brother, and nephews and nieces by deceased sister . . . . .	Each in equal shares <i>per capita</i> , and not <i>per stirpes</i> .
Brother and grandfather . . . . .	Whole to brother.
Brother's grandson, and brother or sister's daughter . . . . .	To daughter.
Brother and two aunts . . . . .	To brother.
Brother and wife . . . . .	Half to brother, half to wife.
Mother and brother . . . . .	Equally.*
Wife, mother, and children of a deceased brother (or sister) . . . . .	Half to wife, a fourth to mother, and a fourth <i>per stirpes</i> to deceased brother or sister's children,†
Wife, brother, or sister and children of a deceased brother or sister . . . . .	Half to wife, a fourth to brother or sister <i>per capita</i> , one-fourth to deceased brother or sister's children, <i>per stirpes</i> .
Brother or sister, and children of a deceased brother or sister . . . . .	Half to brother or sister <i>per capita</i> , half to children of deceased brother or sister, <i>per stirpes</i> .
Grandfather and brother . . . . .	All to brother.‡

\* Page 556.

<sup>1</sup> 2 Inst. 38. See 1 P. Wms. 8.

\* *Keilway v. Keilway*, 2 P. Wms. 344; 1 Stra. 710.

† *Stanley v. Stanley*, 1 Atk. 458.

‡ *Evelyn v. Evelyn*, 3 Atk. 762.

power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato*:<sup>a</sup> which, and because the act was also penned by an eminent civilian,<sup>o</sup> has occasioned a notion that the parliament of England copied it from the Roman prætor: though indeed it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions [ 517 ] are given that no child of the intestate, (except his heir at law,) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law;<sup>p</sup> which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland; and, with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England under the name of *hotchpot*.<sup>q</sup>

Before I quit this subject, I must however acknowledge that the doctrines and limits of representation, laid down

<sup>a</sup> The general rule of such successions was this; 1. The general or lineal descendants in equal portions. 2. On failure of these, the parents or lineal descendants, and with them the brethren or sisters of the whole blood; or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother

or sister deceased. 3. The next collateral relations in equal degrees. 4. The husband or wife of the deceased. (Pf. 38, 15, 1. Nov. 118, c. 1, 2, 3, 127, c. 1.)

<sup>o</sup> Sir Walter Walker. Lord Raym. 574.

<sup>p</sup> Pf. 37, 6, 1.

<sup>q</sup> See ch. 13, p. 213.

in the statute of distribution, seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only.<sup>r</sup> They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*, in the right of another person. As if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but if one of these brothers, A., had been dead leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes*; viz. one third to A.'s three children, another third to B.'s two children; and the remaining third to C., the surviving brother: yet if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz. each of them one fifth part.<sup>s</sup>

Division.  
per capita  
and per  
stirpes.

The statute of distributions expressly excepts and reserves the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned,<sup>t</sup> their ancient customs remain in full force, with respect to the estates of intestates. I shall therefore conclude this chapter, and with it the present volume, with a few remarks on those customs. [ 518 ]

Customs of certain places excepted out of the statutes of distribution.

In the first place we may observe, that in the city of London,<sup>u</sup> and province of York,<sup>v</sup> as well as in the kingdom of Scotland,<sup>w</sup> and probably also in Wales, (concerning which there is little to be gathered, but from the stat. 7 & 8 W. III. c. 38,) the effects of the intestate, after payment of his debts, are in general divided according to the ancient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting for the widow's her apparel and the furniture of

Customs of the city of London, the province of York, &c.

<sup>r</sup> See ch. 16, page 255.

<sup>s</sup> Prec. Chan. 54.

<sup>t</sup> Page 558.

<sup>u</sup> Lord Raym. 1329.

<sup>v</sup> 2 Burn. Eccl. Law, 746.

<sup>w</sup> *Ibid.* 782.

her bed-chamber, which in London is called the *widow's chamber*;) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator; if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other;\* if neither widow nor child, the administrator shall have the whole.<sup>7</sup> And this portion, or *dead man's part*, the administrator was wont to apply to his own use,<sup>8</sup> till the statute 1 Jac. II. c. 17, declared that the same should be subject to the statute of distribution. So that if a man dies worth 1800*l.* personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child, she shall still have eight

[ 519 ] parts, as before; and the child shall have ten, six by the custom and four by the statute: if he leaves a widow and no child, the widow shall have three fourths of the whole, two by the custom and one by the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with regard to the custom only;<sup>a</sup> but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement.<sup>b</sup> And if any of the children are advanced by the father in his lifetime with any sum of money (not amounting to their full proportionable part) they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom:<sup>c</sup> but, if they are fully advanced, the custom entitles them to no further dividend.<sup>d</sup>

Where they differ.

Thus far in the main the customs of London and of York agree: but, besides certain other less material variations, there are two principal points in which they con-

\* 1 P. Wms. 341; Salk. 246.

<sup>7</sup> 2 Show. 175.

<sup>8</sup> 2 Freem. 85; 1 Vern. 133.

<sup>a</sup> 2 Vern. 665; 3 P. Wms. 16.

<sup>b</sup> 1 Vern. 16; 2 Chan. Rep. 252.

<sup>c</sup> 2 Freem. 279; 1 Eq. Cas. Abr. 155; 2 P. Wms. 526.

<sup>d</sup> 2 P. Wms. 527.



siderably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament :<sup>e</sup> and, if they die under that age, whether sole or married, their share shall survive to the other children : but after the age of twenty-one, it is free from any orphanage custom, and in case of intestacy, shall fall under the statute of distributions.<sup>f</sup> The other, that in the province of York, the heir at common law, who inherits any land, either in fee or in tail, is excluded from any filial portion or reasonable part.<sup>g</sup> But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And, as a similar policy formerly prevailed in every part of the island, we may [ 520 ] fairly conclude the whole to be of British original ; or, if derived from the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs : though it is not improbable that the resemblances which yet remain may be owing to the Roman usages ; introduced in the time of Claudius Cæsar, who established a colony in Britain to instruct the natives in legal knowledge ;<sup>h</sup> inculcated and diffused by Papinian, who presided at York as *præfectus prætorio* under the emperors Severus and Caracalla ;<sup>i</sup> and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

<sup>e</sup> 2 Vern. 558.<sup>h</sup> Tacit. *Annal.* l. 12, c. 32.<sup>f</sup> Prec. Chanc. 537.<sup>i</sup> Selden in *Fletam*, cap. 4, s. 3.<sup>g</sup> 2 Burn. 754.



# APPENDIX.

## No. I.

### A MODERN FEOFFMENT TO USES TO BAR DOWER.

THIS INDENTURE, made the 1st day of March in the year of our Lord, 1844, *Between* Abel Smith of, &c. of the first part; Robert Thompson of, &c. of the second part; and James Hicks of, &c. of the third part; WHEREAS, the said Robert Thompson hath contracted and agreed with the said Abel Smith for the absolute purchase of the hereditaments hereinafter described, and intended to be hereby granted and enfeoffed, and the inheritance thereof in fee simple, free from incumbrances, at or for the price or sum of £; NOW THIS INDENTURE WITNESSETH, that in pursuance and performance of the said agreement, and in consideration of the sum of £ of lawful money of Great Britain by the said Robert Thompson to the said Abel Smith, in hand paid at or before the sealing and delivery of these presents (the receipt of which said sum of £, he the said Abel Smith doth hereby acknowledge, and of and from the same and every part thereof doth hereby acquit, release, and for ever discharge the said Robert Thompson, his heirs, executors, administrators and assigns, and every of them,) *He* the said Abel Smith *Hath* given, granted and enfeoffed, *And* by these presents *Doth* give, grant and enfeoff unto the said Robert Thompson and his heirs, ALL THOSE, &c. (*describe the parcels,*) *Together* with all and singular houses, &c. (*general words,*) *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the hereditaments and premises hereby granted and enfeoffed, or intended so to be, and of every part and parcel thereof, *And* all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of him the said Abel Smith, in, to, out or upon the same premises, and every part and parcel thereof, with their and every of their appurtenances, TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises hereinbefore described, and granted and enfeoffed, or intended so to be, with their rights, members, and appurtenances, unto the said Robert Thompson, and his heirs for ever, *To such uses, upon such trusts, and to and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations, as the said Robert Thompson by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, shall from time to time direct,*

Premises.

Date and parties.

Contract for purchase.

Testatum, whereby, in consideration of purchase-money,

(the receipt of which purchaser acknowledges.)

Vendor enfeoffs.

Premises ;

and the reversion ;

and all the estate.

Habendum

unto purchaser,

to such uses, as purchaser shall by any deed appoint;

and in default of appointment, to the use of purchaser for life; remainder to trustees to bar dower during the life of purchaser, upon trust for purchaser. Remainder to purchaser in fee.

Covenants for title by vendor: that he is seised in fee;

and has good right to convey;

and that the premises shall be held to the uses hereinbefore declared.

limit or appoint, *And* in default of and until such direction, limitation or appointment, and so far as the same shall not extend, *To the use* of the said Robert Thompson and his assigns during his life, without impeachment of waste; and after the determination of that estate by forfeiture or otherwise in his life-time, *To the use* of the said James Hicks and his heirs, during the life of the said Robert Thompson, in trust for him the said Robert Thompson and his assigns, during his life, and to the end and intent that neither the present nor any future wife of the said Robert Thompson may become entitled to dower out of or in the said premises, or any part thereof; *And* immediately after the determination of the estate hereinbefore limited to the said James Hicks and his heirs during the life of the said Robert Thompson, *To the use* of him the said Robert Thompson, his heirs and assigns, for ever; *And* the said Abel Smith doth hereby for himself, his heirs, executors, administrators and assigns, COVENANT, promise and agree with and to the said Robert Thompson, his appointees, heirs and assigns, in manner following (that is to say) *That* for and notwithstanding any act, deed, matter or thing whatsoever by him the said Abel Smith made, done, omitted, committed, executed, or knowingly or willingly suffered to the contrary, he the said Abel Smith is at the time of the sealing and delivering of these presents lawfully, rightfully and absolutely seised of and in, or well and sufficiently entitled to the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, and every part thereof, with their and every of their appurtenances, for a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple in possession, without any manner of condition, trust, power of revocation, equity of redemption, remainder or limitation of any use or uses, or other restraint, cause, matter or thing whatsoever, to alter, charge, defeat, incumber, revoke or make void the same; *And* that for and notwithstanding any such act, deed, matter or thing as aforesaid, he the said Abel Smith now hath in himself good right, full power, and lawful and absolute authority to grant and enfeoff the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, with their appurtenances unto the said Robert Thompson and his heirs, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents, *And that* the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, with their appurtenances, shall and may from time to time, and at all times hereafter, remain, continue, and be *To the uses*, upon and for the trusts, intents and purposes, and with, under, and subject to the powers, provisoes, and agreements and declarations hereinbefore declared and contained of and concerning the same, and be peaceably and quietly held and enjoyed, and the rents, issues and profits thereof, and of every part thereof, received and taken accordingly, without any lawful let, suit, trouble, denial, claim, demand, interruption or eviction whatsoever, of or by him the said Abel Smith or his heirs, or of, from

or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from or under, or in trust for him the said Abel Smith ; *And that* free and clear, and freely and clearly and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said Abel Smith, his heirs, executors and administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, and all rights and titles of or to dower, uses, trusts, entails, wills, mortgages, leases, statutes merchant or of the staple, recognizances, judgments, executions, extents, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entry, cause and causes of forfeiture and re-entry, debts of record, debts due to the Queen's Majesty, and of and from all other estates, titles, troubles, charges, debts and incumbrances whatsoever, either already had, made, executed, occasioned and suffered, or hereafter to be had, made, executed, occasioned and suffered by the said Abel Smith or his heirs, or by any other person or persons lawfully or equitably claiming or to claim by, from or under, or in trust for him, them, or any of them, or by his or their acts, deeds, means, default or procurement ; *And further*, that he the said Abel Smith and his heirs, and all and every other person or persons having or claiming, or who shall or may hereafter have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever, either at law or in equity, of, in, to or out of the said hereditaments, and premises hereby granted and enfeoffed, or intended so to be, with their appurtenances, or any of them, or any part thereof, by, from or under, or in trust for him the said Abel Smith or his heirs, shall and will from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges of the said Robert Thompson, his heirs or assigns, make, do, acknowledge and execute all such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, enfeoffing and assuring the said hereditaments and premises, hereby granted and enfeoffed, or intended so to be, and every part thereof, with their appurtenances, unto the said Robert Thompson and his heirs, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents, as by the said Robert Thompson, his heirs or assigns, or his or their counsel in the law, shall be reasonably advised, devised, and required. IN WITNESS whereof the said several parties have set their hands and seals the day and year first above written.

free from incumbrances ;

and for further assurance.

Conclusion.

Signed, sealed, and delivered,  
(being first duly stamped)  
in the presence of }

[Parties].

[Witnesses].

## No. II.

## A MODERN CONVEYANCE BY LEASE AND RELEASE.

§ 1. *The Lease, or Bargain and Sale for a Year.\**

Premises.	THIS INDENTURE, made the first day of March, in the year of our Lord, 1840, BETWEEN Abel Smith of
Parties.	in the county of _____, of the first part, and
Witnesseth that for a nominal consideration	Robert Thompson of _____, of the other part : WITNESSETH that in consideration of ten shillings of lawful money of Great Britain paid by the said Robert Thompson to the said Abel Smith at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged), <i>He</i> the said Abel
vendor bargains and sells parcels.	Smith <i>Hath</i> bargained and sold, and by these presents <i>Doth</i> bargain and sell unto the said Robert Thompson, his executors, administrators and assigns, ALL THAT, &c. ( <i>as in release</i> ); <i>Together</i> with all houses &c. ; <i>And</i> the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the premises hereby bargained and sold, or intended so to be, and every part and parcel thereof, To
Habendum	HAVE AND TO HOLD the said messuage or tenement, hereditaments and premises hereby bargained and sold, or intended so to be, and every part and parcel thereof, with their appurtenances, unto the said Robert Thompson, his executors, administrators and assigns,
to purchaser for one whole year.	from the day next before the day of the date of these presents, for the term of one whole year thence next ensuing, and
Reddendum,	fully to be complete and ended ; YIELDING AND PAYING therefore the rent of one pepper-corn on the last day of the said term, if
to the intent that purchaser may take a release of the premises.	the same rent should be lawfully demanded, <i>To</i> the intent and purpose that by virtue of these presents and by force of the statute made for transferring uses into possessions, the said Robert Thompson may be in the actual possession of all and singular the said messuage or tenement, hereditament and premises, hereby bargained and sold or intended so to be, and every part and parcel thereof, with their appurtenances, and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises to him and his heirs, to the use of him and his heirs, as declared by another indenture already prepared, and intended to be dated the day next after the day of the date hereof. IN WITNESS, &c.

\* It may still be useful to give this form, although it is now rarely actually prepared. See *ante*, p. 384.

§ 2. *The Release.*

THIS INDENTURE, made the second day of March in the year of our Lord 1840, BETWEEN Abel Smith of, &c., of the one part ; and Robert Thompson of, &c., of the other part : WHEREAS John Smith, being at the time of making his will hereinafter recited, and thenceforth to the time of his decease, seised of or otherwise well entitled in fee simple in possession to the messuage or tenement, lands and hereditaments, hereinafter described and intended to be hereby conveyed, with their appurtenances, did, in such manner as the law requires for rendering valid devises of freehold estates, duly sign and publish his last will and testament in writing, bearing date on or about the twelfth day of August, one thousand eight hundred and thirty-four, and thereby (amongst other things) gave and devised the same messuage or tenement, lands or hereditaments and premises hereinafter described, unto his son the said Abel Smith, his heirs and assigns, for ever ; AND WHEREAS the said John Smith departed this life on or about the fourth day of September in the same year, without having altered or revoked his said will, and on or about the first day of October next following, the said will was duly proved in the Ecclesiastical Court of the Archbishop of Canterbury by the executors named therein ; AND WHEREAS the said Robert Thompson hath contracted and agreed with the said Abel Smith for the absolute purchase of the messuage or tenement, lands, hereditaments and premises, hereinafter described, and intended to be hereby conveyed, and the inheritance thereof in fee simple, with their appurtenances, free from incumbrances, at or for the price or sum of 4000*l.* : NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and of a certain act made and passed in the fourth year of her present majesty, entituled "an act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties," and in consideration of the sum of 4000*l.* of lawful money of Great Britain by the said Robert Thompson to the said Abel Smith in hand well and truly paid at or immediately before the sealing and delivery of these presents (the receipt of which said sum of 4000*l.* the said Abel Smith doth hereby admit and acknowledge, and of and from the same and every part thereof doth hereby acquit, release and for ever discharge the said Robert Thompson, his heirs, executors, administrators and assigns,) He the said Abel Smith Hath granted, bargained, sold, released and confirmed, and by these presents *Doth* grant, bargain, sell, release and confirm unto the said Robert Thompson, [in<sup>a</sup> his actual possession, now being by virtue of a bargain and sale to him thereof made by the said Abel Smith in consideration of ten shillings by an indenture bearing date the day next before the

Premises.

Parties.

Recitals that John Smith made his will, whereby he devised the premises unto his son the vendor in fee.

Death of John Smith.

Probate of his will.

Contract for purchase of premises.

Testatum, whereby in consideration of the purchase money paid by purchaser to vendor,

Vendor conveys unto Robert Thompson.

<sup>a</sup> The reference to the lease for a year is of course omitted when no lease for a year is employed.

Parcels.  
General  
words.

Habendum

unto the  
purchaser in  
fee.

Covenants  
for title:

that vendor  
is seised in  
fee,

and that he  
has good  
right to  
convey,

and that the  
purchaser  
may quietly  
enjoy the  
premises,

day of the date of these presents, for the term of one year commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,] and his heirs, ALL THAT, &c. (*describe the parcels.*) Together with all and singular houses, outhouses, edifices, bridges, farms, stables, yards, gardens, orchards, ways, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the said hereditaments and premises hereby granted and released belonging or in anywise appertaining: And the reversion, &c. (*see ante, p. i.*) And all the estate, &c. (*see ante, p. i.*) To HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and all and singular other the premises hereby granted and released, or intended so to be, with their and every of their appurtenances, unto the said Robert Thompson, his heirs and assigns, To the use of the said Robert Thompson, his heirs and assigns, for ever; And the said Abel Smith doth hereby for himself, his heirs, executors and administrators, COVENANT, promise, and agree with and to the said Robert Thompson, his heirs and assigns, That for and notwithstanding any act, deed, matter, or thing whatsoever, by him the said Abel Smith, or the said John Smith the testator, made, done, omitted, committed, executed, or knowingly or willingly suffered to the contrary, he the said Abel Smith is at the time of the sealing and delivering these presents, lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, and every part thereof, with their and every of their appurtenances, for a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, trust, power of revocation, equity of redemption, remainder or limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, charge, defeat, incumber, revoke, or make void the same: And that for and notwithstanding any such act, deed, matter or thing as aforesaid, he the said Abel Smith now hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, release, and convey the said messuage or tenement, lands, hereditaments and premises hereby granted and released, or intended so to be, with their appurtenances, unto and to the use of the said Robert Thompson, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; And that it shall and may be lawful to and for the said Robert Thompson, his heirs and assigns, from time to time and at all times hereafter, peaceably and quietly to enter into, hold, occupy, possess and enjoy the said messuage or tenement, hereditaments and premises hereby granted and released, or intended so to be, with their appurtenances, and to have, receive and take the rents, issues and profits thereof, and



of every part thereof, to and for his and their own use and benefit, without any lawful let, suit, trouble, denial, claim, demand, interruption or eviction whatsoever, of or by him the said Abel Smith, or his heirs, or of, from or by any other person or persons whomsoever, lawfully or equitably claiming or to claim by, from or under, or in trust for him, them or any of them, or the said John Smith the testator; *And that* free and clear, and freely and clearly and absolutely acquitted, exonerated, released and for ever discharged or otherwise by the said Abel Smith and his heirs, executors and administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, dowers, and all rights and titles to dower, uses, trusts, entails, wills, mortgages, leases, statutes merchant or of the staple, recognizances, judgments, executions, extents, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entry, debts of record, debts due to the Queen's Majesty, and of, from and against all other estates, titles, troubles, charges, debts and incumbrances whatsoever, either already had and made, executed, occasioned and suffered by the said Abel Smith or his heirs, or by any other person or persons lawfully or equitably claiming, or to claim by, from or under, or in trust for him, them, or any of them, or by, from or under, or in trust for the said testator, or by his or their acts, deeds, means, default or procurement; *And further*, that he the said Abel Smith and his heirs and every other person or persons having, claiming, or who shall or may hereafter have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever, either at law or in equity, of, in, to or out of the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, or any of them or any part thereof, by, from or under, or in trust for him the said Abel Smith or his heirs, or the said testator, shall, and will, from time to time and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges of the said Robert Thompson, his heirs or assigns, make, do, acknowledge, levy, suffer and execute, or cause or procure to be made, done, acknowledged, levied, suffered and executed, all such further and other lawful and reasonable acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying, and assuring of the said messuage or tenement, lands, hereditaments, and premises, hereby granted and released, or intended so to be, and every part thereof, with their appurtenances, unto and to the use of the said Robert Thompson, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said Robert Thompson, his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, ad-

free from  
incum-  
brances,

and for fur-  
ther assur-  
ance.

Declaration  
that no wife  
of the pur-  
chaser shall  
be entitled to  
dower out of  
the premises.

vised and required. *And it is hereby agreed and declared* between and by the parties to these presents, That neither the present wife of the said Robert Thompson, in case she shall survive the said Robert Thompson, nor any future wife of the said Robert Thompson with whom he may afterwards intermarry, and who shall survive him, shall have any right, title or estate to or in, dower out of or in the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, or to or in any part thereof.

IN WITNESS, &c.

## No. III.

## A MORTGAGE IN FEE.

THIS INDENTURE, made the 1st day of January, 1840, Premises.  
*Between* John Thomas of the parish of St. John, in the county Parties.  
of Surrey, yeoman, of the one part, and Edward Sikes of the  
city of London, gentleman, of the other part: *Whereas* the said Recital that  
John Thomas is seised of or well entitled as tenant in fee-simple mortgagor is  
in possession to the messuage or tenement, lands and heredita- seised in fee  
ments hereinafter described, and intended to be hereby granted of the pre-  
and released, with their rights, members and appurtenances; misses to be  
*And whereas* the said John Thomas, having occasion for the sum mortgaged.  
of 1000*l.*, hath applied to the said Edward Sikes to advance and That mort-  
lend him the same, which he hath agreed to do on having the gagor has  
repayment thereof, with interest for the same, after the rate of applied to  
5*l.* for 100*l.* by the year, secured to him the said Edward Sikes, mortgagee to  
his executors, administrators or assigns, by a mortgage of the lend the  
said messuage or tenement, lands and hereditaments, hereinafter money.  
described, and intended to be hereby granted and released, Witnessing  
with their appurtenances: NOW THIS INDENTURE WITNESSETH, part, whereby  
that in pursuance of a certain act made and passed, &c. (as in in considera-  
p. v.), and in performance of the said agreement, and in con- tion of the  
sideration of the sum of 1000*l.* of lawful money of Great Britain, receipt of  
by the said Edward Sikes to the said John Thomas in hand well the mortgage  
and truly paid at or immediately before the sealing and deli- money.  
very of these presents, (the receipt of which said sum of 1000*l.*  
he the said John Thomas doth hereby acknowledge, and of and  
from the same and every part thereof, doth hereby acquit, re-  
lease, and for ever discharge the said Edward Sikes, his exe-  
cutors, administrators and assigns,) *He*, the said John Thomas,  
*Hath* granted, bargained, sold, released and confirmed, and by  
these presents *Doth* grant, bargain, sell, release and confirm,  
unto the said Edward Sikes and his heirs, ALL THAT messuage  
or tenement, situate and being in the parish of A. in the  
county of G. &c. (*describe the parcels*) Together with all and  
every houses, out-houses, edifices, bridges, barns, stables, yards,  
gardens, orchards, ways, water-courses, liberties, privileges,  
easements, profits, commodities, emoluments, hereditaments, and  
appurtenances whatsoever, to the hereditaments and premises

Mortgagor  
conveys.

Parcels,  
General  
words.

The rever-  
sion.

and all the  
estate.

Habendum

To mort-  
gagee and his  
heirs to the  
use of  
mortgagor  
and his heirs,  
subject to  
proviso.

Proviso that  
if the mort-  
gage money  
shall be  
repaid,

mortgagee  
will re-  
convey.

Covenant by  
mortgagor  
that he will  
pay mort-  
gage money,

hereby granted and released belonging, or in any way apper-  
taining; *And* the reversion and reversions, remainder and  
remainders, yearly and other rents, issues and profits of all and  
singular the lands and tenements hereby granted and released, or  
intended so to be, and of every part and parcel thereof; *And* all  
the estate, right, title, interest, inheritance, use, trust, property,  
profit, possession claim and demand whatsoever, both at law and  
in equity, of him the said John Thomas, into, out of, or upon the  
same premises, and every part and parcel thereof, with their and  
every of their appurtenances, **TO HAVE AND TO HOLD** the said  
messuage or tenement, lands, hereditaments, and all and every  
other the premises hereby granted and released, or intended so  
to be, and every part and parcel thereof, with their and every of  
their appurtenances, unto the said Edward Sikes, his heirs and  
assigns; *To the Use* of the said Edward Sikes, his heirs and assigns  
for ever, *But* subject nevertheless to the proviso or agreement  
for redemption hereinafter contained, (that is to say,) **PROVIDED**  
**ALWAYS**, and it is hereby agreed and declared between and by  
the parties hereto, that if the said John Thomas, his heirs, exe-  
cutors or administrators, shall and do on the — day of — now  
next ensuing, well and truly pay or cause to be paid to the said  
Edward Sikes, his executors, administrators and assigns, the sum  
of 1000*l.* of lawful money of Great Britain, together with the in-  
terest for the same, after the rate of 5*l.* for every 100*l.* by the year,  
to be computed from the day of the date of these presents, without  
making any abatement or deduction whatever out of the same  
sum and interest, or any part thereof, for or in respect of any  
present or future taxes, charges, assessments or impositions, or  
any other cause, matter or thing whatsoever, *Then*, and in such  
case he the said Edward Sikes, his heirs and assigns, shall and  
will, at any time thereafter, at the request and expense of the  
said John Thomas, his heirs and assigns, re-convey the said mes-  
suage or tenement, lands, hereditaments and premises, hereby  
granted and released, or intended so to be, with their appurte-  
nances, unto the said John Thomas, his heirs and assigns, or as  
he or they shall in that behalf order or direct, free from all in-  
cumbrances whatsoever, made, done or committed by the said  
Edward Sikes, his heirs, executors, administrators, or assigns;  
*And* he the said John Thomas doth hereby for himself, his heirs,  
executors and administrators, covenant, promise and agree with  
and to the said Edward Sikes, his heirs, executors, administra-  
tors and assigns, that he the said John Thomas, his heirs, exe-  
cutors, administrators and assigns, shall and will, on the —  
day of —, well and truly pay, or cause to be paid to the  
said Edward Sikes, his executors, administrators or assigns,  
the sum of 1000*l.* of lawful money of Great Britain, and  
shall and will pay interest for the same in the mean time  
at the rate of 5*l.* for 100*l.* by the year, to be computed from  
the day of the date of these presents, by two equal half  
yearly payments, on the — day of —, and the —

day of ———, in each year ; and shall and will make the said several payments without any deduction or abatement whatever out of the same or any part thereof for or in respect of any present or future taxes, rates, assessments or impositions, or any other matter, cause or thing whatsoever ; *And further* that he the said John Thomas hath now in himself good right, full power and lawful and absolute authority to grant, bargain, sell and convey the said message or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, unto and to the use of the said Edward Sikes, his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents ; *And also* that if default be made in the payment of the said sum of 1000*l.* or the interest thereof, or any part thereof respectively, contrary to the aforesaid proviso or condition for payment of the same, and the true intent and meaning of these presents, *Then* and in such case it shall and may be lawful to and for the same Edward Sikes, his heirs and assigns, at any time or times hereafter, into and upon all and every the said hereditaments and premises hereby granted and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess, enjoy, and receive and take the rents, issues and profits thereof, to and for his and their own use, without any lawful let, suit, trouble, interruption or disturbance whatsoever of, from or by the said John Thomas, his heirs or assigns, or any person or persons whomsoever, having or lawfully or equitably, or who shall or may have or lawfully or equitably claim any estate, right, title or interest in, to, out of, or upon the said message or tenement, lands, hereditaments and premises hereby granted and released, or intended so to be, or any of them, or any part or parts thereof ; *And* that free and clear, and freely and clearly and absolutely acquitted, exonerated and released, and for ever discharged or otherwise by the said John Thomas, his heirs, executors or administrators, saved, protected, kept harmless and indemnified, of, from and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, trusts, will, entails, legacies, rent charges, rent seck, and arrears of rent, fines, issues, amercements, statutes, recognizances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, interests, troubles, charges, debts and incumbrances whatsoever ; *And moreover*, that if default be made in payment of the said sum of 1000*l.* or the interest thereof, or any part thereof respectively, contrary to the aforesaid proviso or condition for payment of the same, and the true intent and meaning of these presents, *Then* and in such case he the said John Thomas and his heirs, and all and every other person and persons whomsoever, having or lawfully or equitably claiming, or who shall or may lawfully or equitably claim any estate, right, title or interest of, in, or to the said message or tenement, lands, hereditaments

and for title.  
That mort-  
gagor hath  
good right to  
convey ;

that if de-  
fault shall  
be made,

it shall be  
lawful for  
mortgagee to  
enter,  
and the same  
quietly to  
enjoy :

free from en-  
cumbrances,

and for  
further as-  
surance.

and premises, hereby granted and released, or intended so to be, with their appurtenances or any of them, or any part or parts thereof, shall and will from time to time and at all times hereafter, at the request of the said Edward Sikes, his heirs and assigns, but at the expense of the said Edward Sikes, his heirs, executors, administrators, or assigns, make, do, and execute, or cause to be made, done, or executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, conveyances and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, conveying, and assuring of the same hereditaments and premises, hereby granted and released or intended so to be, with their appurtenances, unto and to the use of the said Edward Sikes, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said Edward Sikes, his heirs and assigns, or by his or their counsel in the law, shall be reasonably devised, advised, and required; PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of the parties further is, that until default shall be paid in payment of the said sum of 1000*l.* or the interest thereof, or any part thereof respectively, contrary to the said proviso or agreement for payment of the same, and the true intent and meaning of these presents, it shall and may be lawful to and for the said John Thomas, his heirs and assigns, peaceably and quietly to have, hold, occupy, possess and enjoy the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use, without any let, suit, trouble, interruption or disturbance whatsoever of, from or by the same Edward Sikes, his heirs, executors, administrators, and assigns, or of, from or by any other person or persons whomsoever, lawfully or equitably claiming or to claim, by from or under, or in trust for him, them or any of them. In WITNESS, &c.

Proviso that  
until default  
shall be  
made, mort-  
gagor may  
quietly  
enjoy.

Conclusion.

## No. IV.

AN OBLIGATION OR BOND, WITH CONDITION  
FOR THE PAYMENT OF MONEY.

---

KNOW ALL MEN by these presents, that I Abel Smith, of \_\_\_\_\_, in the county of \_\_\_\_\_, gentleman, am held and firmly bound to Robert Thompson, of \_\_\_\_\_, esquire, in the sum of one thousand pounds of lawful money of Great Britain, to be paid the said Robert Thompson or to his certain attorney, his executors, administrators or assigns, for which payment to be well and truly made I bind myself, my heirs, executors and administrators, and every of them, firmly by these presents, sealed with my seal. Dated this twenty-second day of March in the year of our Lord, 1840.

THE CONDITION of the above written bond or obligation is such, That if the above bounden Abel Smith, his heirs, executors or administrators, should well and truly pay or cause to be paid unto the said Robert Thompson, his executors, administrators or assigns, the full sum of five hundred pounds of lawful money of Great Britain with interest for the same after the rate of five pounds for one hundred pounds by the year, upon the twenty-second day of September now next ensuing, without any deduction or abatement whatsoever, then the above written bond or obligation shall be void and of no effect, or otherwise shall be and remain in full force and virtue.

Sealed and delivered (being  
first duly stamped) in the  
presence of  
[ *Witnesses.* ]

ABEL SMITH.

---

## No. V.

DEED FOR BARRING AN ENTAIL, UNDER THE  
STATUTE 3 & 4 WILL. IV., c. 74.

THIS INDENTURE, made the first day of March, 1840,  
 BETWEEN John Smith, of \_\_\_\_\_, of the first part; Abel  
 Smith, of \_\_\_\_\_, of the second part; and Robert Thompson,  
 of \_\_\_\_\_, of the third part: WHEREAS William Smith being at  
 the time of making his will hereinafter recited, and thenceforth  
 to the time of his decease, seised of or otherwise well entitled in  
 fee simple in possession to the messuages or tenements, lands and  
 hereditaments hereinafter described, and intended to be hereby  
 released, with their appurtenances, did, in such manner as the  
 law required for rendering valid devises of freehold estates, duly  
 sign and publish his last will and testament in writing, bearing  
 date on or about the first day of May 1790, *And* thereby,  
 amongst other things, gave and devised the same hereditaments  
 and premises hereinafter described unto his son the said John  
 Smith and his assigns, for and during the term of his natural life,  
 with a limitation *To the use* of A. B. and C. D., and their heirs,  
 during the life of the said Abel Smith, *Upon trust* to preserve the  
 contingent remainders, with a limitation *To the use* of the said  
 Abel Smith in tail, with divers remainders over: AND WHEREAS  
 the said William Smith departed this life on or about the fourth  
 day of May, 1790, without having altered or revoked his said  
 will, which was duly proved by the executors therein named in  
 the Ecclesiastical Court of the Archbishop of Canterbury: AND  
 WHEREAS the said John Smith and Abel Smith are desirous of  
 barring the estate tail of the said Abel Smith in the said heredita-  
 ments and premises, and of limiting the same hereditaments and  
 premises to the uses and in the manner hereinafter mentioned:  
 NOW THIS INDENTURE WITNESSETH, that in pursuance of  
 a certain act, &c., (*see* ante p. v.) and in order to bar and  
 destroy as well the estate tail of the said Abel Smith in the he-  
 reditaments and premises hereby released, or intended so to be,  
 as all other estates, rights, titles, interests and powers to take  
 effect after the determination or in defeasance of such estate tail,  
 and for disposing of the same hereditaments and premises to the  
 uses and in manner hereinafter mentioned; *And* in consideration

Premises.  
 Date.  
 Parties.  
 Recital of  
 seisin of  
 grandfather,  
 and of his  
 will,  
 whereby he  
 devises to his  
 son for life,  
 to trustees to  
 preserve, to  
 grandson  
 in tail,  
 with divers  
 remainders  
 over.  
 Death of  
 William  
 Smith with-  
 out revoking  
 his will.  
 Probate of  
 will.  
 Desire of  
 parties to  
 bar the estate  
 tail in the  
 premises.  
 Witnessing  
 part, whereby  
 for barring  
 the estate tail  
 and limiting  
 the premises,  
 and for a no-  
 minal consi-  
 deration.



of the sum of ten shillings by the said Robert Thompson to each of them the said John Smith and Abel Smith paid at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) *They* the said Abel Smith and also the said John Smith, as protector of the settlement under the herein-before recited will, *Have* and each of them *Hath* granted, bargained, sold, released and confirmed, *And* by these presents *Do* and each of them *Doth* grant, bargain, sell, release and confirm unto the said Robert Thompson and his heirs, **ALL THAT** messuage or tenement hereditaments and premises, situate and lying in the parish of, &c. in the county of, &c.; *Together* with all and singular commons, ways, water-courses, liberties, privileges, easements, profits, emoluments, &c. &c. (*see ante*, p. vi.) thereunto belonging; *And* the reversion and reversions, remainder and remainders; yearly and other rents, issues, profits, &c. &c.; *And* all the estate, &c. (*see ante*, p. i.) **TO HAVE AND TO HOLD** the said messuages, tenements, lands or hereditaments, and all and singular other the premises hereby granted and released, or intended so to be, and every part and parcel thereof, with their and every of their appurtenances, *Unto* the said Robert Thompson, his, heirs and assigns, free and discharged of and from the said estate tail, and all estates, rights, titles, interests and powers to take effect after the determination or in defeasance of the said estate tail, *But nevertheless To the use of* such person or persons, for such estate or estates, with such powers or limitations over, upon, and for such trusts, intents, and purposes, charged or chargeable with such sum or sums of money annual or in gross, and with, under, and subject to such powers, conditions, limitations, declarations, and agreements as they the said John Smith and Abel Smith shall by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by both of them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time or at any time direct or appoint; *And* in default of such joint direction and appointment, and so far as the same, if incomplete, shall not extend, *To the use of* the said John Smith and his assigns during the joint lives of him the said John Smith and Abel Smith; *And* in case the said Abel Smith should survive the said John Smith, then from and after the decease of the said John Smith so dying in the lifetime of the said Abel Smith, *To the use of* the said Abel Smith and his heirs and assigns for ever; *But* in case the said Abel Smith should depart this life in the lifetime of the said John Smith, then immediately from and after the decease of the said Abel Smith so dying in the lifetime of the said John Smith, *To the use of* the said John Smith, his heirs and assigns for ever. **IN WITNESS, &c.**

tenant in tail  
and protector  
convey

parcels.

Habendum

unto Robert  
Thompson,

To the use of  
such persons  
as protector  
and tenant  
in tail shall  
appoint,

and in default  
of appoint-  
ment,  
to the use of  
protector for  
life, during  
the joint  
lives of  
himself and  
tenant in  
tail; and if  
tenant in tail  
should sur-  
vive, to the  
use of tenant  
in tail in fee;  
but if tenant  
in tail should  
die first, to  
the use of  
protector in  
fee.



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# **THE ACTS**

**7 & 8 VICT. c. 76, AND 8 & 9 VICT. c. 106.**

**WITH**

**EXPLANATORY NOTES.**



THE ACT  
TO  
SIMPLIFY THE TRANSFER  
OF PROPERTY,  
7 & 8 VICT. c. 76,  
AND  
THE ACT  
TO  
AMEND THE LAW OF REAL PROPERTY,  
8 & 9 VICT. c. 106,  
WITH  
NOTES  
EXPLAINING THE ALTERATIONS MADE IN THE LAW.

BY  
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OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

LONDON:  
E. SPETTIGUE, 67, CHANCERY LANE.

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## ADVERTISEMENT.

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THE Act 8 & 9 Vict. c. 106, must be considered as occasioned by the difficulties felt by the profession in carrying the Act 7 & 8 Vict. c. 76 into practical operation. It is to be observed, however, that the latter Act, with the exception of the 8th section, (which is repealed by s. 1 of the 8 & 9 Vict. c. 106 from its commencement) has been in force from the 1st of January, 1845, except so far as it is qualified by s. 13, 7 & 8 Vict. c. 76; and that all transactions within its range from that time down to the 1st of October next (when the Act 8 & 9 Vict. c. 106, comes into operation) will be governed by it. It will, therefore, still be necessary to some extent to be acquainted with its provisions.

It is further to be observed, that there are two sections of the stat. 7 & 8 Vict. c. 76, which are entirely repealed without any substitute being attempted to be made in their place. These are the 9th, post p. 13, and the 10th, p. 14.

The Editor does not consider it to be his duty on the present occasion to enter into any critical examination of the provisions of these acts. This may be the duty of the judge when they are brought before him, but it is the duty of the practitioner to aid the legislature to the extent of his ability in carrying into operation all Acts to amend the Law: and this responsibility is the more grave when it is considered that even a *doubt* expressed by a lawyer of any weight in the profession may seriously embarrass the carrying an Act into operation.

The only intention of the present edition of these Acts is

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AN ACT  
TO  
SIMPLIFY THE TRANSFER  
OF  
PROPERTY.

*Now Repealed*

7 & 8 VICT. c. 76.

*An Act to Simplify the Transfer of Property.*

[6th August 1844.]

FOR simplifying the Assurance of Property by Deed ;  
BE IT ENACTED, by the Queen's most Excellent Majesty,  
by and with the advice and consent of the Lords Spiritual  
and Temporal, and Commons, in this present Parliament  
assembled, and by the authority of the same, as follows ;  
(that is to say)

I. That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows ; (that is to say) the word "Land" shall extend to manors, advowsons, messuages, lands, tithes, tenements and hereditaments, whether corporeal or incorporeal, and to any undivided share thereof, and to any estate or interest therein, and to money subject to be invested in the purchase of land, or any interest therein ; the word "Freehold" shall extend to customary freehold, or such customary land as will pass by deed, or deed and surrender,\* and not

Meaning of  
words  
defined :

"Freehold."

\* This expression is intended to embrace a large class of customary lands, which are not alienable by surrender, but by deed and admittance thereon. See *Burrell v. Dodd*, 3 Bos. & Pull. 378 ; *Doe*

"Conveyance." by surrender alone; the word "Conveyance" shall extend to a feoffment, grant, release, surrender, or other assurance of freehold land; the word "Person" shall extend to a corporation as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing: and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Person." of freehold land; the word "Person" shall extend to a corporation as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing: and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Number and Gender." importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing: and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Freehold  
Land may be

## II. That every person may convey by any deed,<sup>b</sup> with-

d. *Reay v. Huntington*, 4 East, 288; *Doe d. Llewellyn*, 5 Tyr. 899, 2 C. M. & R., 503, S. C.; and Blackstone, by Stewart, vol. ii. p. 104, 3d edit. In the Act dispensing with the necessity of a lease for a year, 4 Vict. c. 21, s. 3, the word "freehold" is to "extend to all lands and hereditaments, for the conveyance of which, if this Act had not been passed, a bargain and sale, or lease for a year, as well as a release, would have been used."

<sup>b</sup> The effect of this clause will be to enable all corporeal and incorporeal hereditaments which might have been conveyed by lease and release, to be transferred by deed, without having recourse to any of the peculiar ceremonies necessary to the present modes of assurance. The feoffment to which livery of seisin is necessary, the bargain and sale to which enrolment is essential, and the release to which a prior lease was requisite previous to the stat. 4 Vict. c. 21, need not be resorted to; but in lieu thereof, the parties may adopt a mode of transfer, to which none of these ceremonies need be added. What, then, is this mode of transfer to be? It must be by *deed*, which however need not be indented (s. 11 of this Act), but which must have all the other requisites of a deed set forth in Blackstone, chapter 22; one of these (p. 361) is "sufficient and legal words properly disposed," and there will be, therefore, no reason in framing assurances under the Act for departing from those well settled forms, which are now universally adopted. The part of the new deed which will probably occasion most doubt, will be what are now called the "operative words." These have been, hitherto, inserted in most cases, not as absolutely necessary, but in order, that if the deed would not operate in the form intended, it might take effect in some other form. See as to this, *Shep. Touch.* 252. Probably some of these words will cease to be used when the Act comes into operation, and some general word not applicable peculiarly to any of the present modes of assurance will be adopted. Of course, as a lease for a year will no longer be necessary, the reference to the Act dispensing with it, which was required by s. 1 of the Act 4 Vic. c. 21, will also cease to be necessary. This reference was not in the bill as it was originally introduced, and was inconsistent with the intentions of the framers of that Act, but was

out livery of seisin or enrolment, or a prior lease, all such freehold land as he might, before the passing of this Act, have conveyed by lease and release; and every such conveyance shall take effect as if it had been made by lease and release. Provided always, that every such deed shall be chargeable with the same stamp duty as would have been chargeable if such conveyance had been made by lease and release.

conveyed  
by Deed,  
without  
Livery of  
Seisin, or  
prior Bargain  
and Sale.

III. That no partition, or exchange or assignment of any freehold or leasehold land shall be valid at law, unless the same shall be made by deed.<sup>c</sup>

Partitions,  
Exchanges  
and Assign-  
ments to be  
by Deed.

required by the Stamp Office for the protection of the revenue. It is to be regretted that the government did not take this opportunity of getting rid of the stamp for the lease for a year, but this is still preserved by the above section. It is to be further observed, that the new conveyance is to take effect as if it had been made by lease and release.

<sup>c</sup> A *partition* between joint-tenants, or tenants in common, to be binding even at the common law, must have been by deed. Litt. s. 290; Co. Litt. 169 a. But partition by coparceners might have been by parol only. The Stat. of Frauds, 29 Car. II. c. 3, abolished this distinction, and made a deed or *writing* in all cases necessary. A mere agreement or note in writing is sufficient, however, to effect a partition in equity as well between joint tenants as tenants in common and coparceners. 2 Bla. Com. 185; 2 Ves. 634; *Frewen v. Relfe*, 2 B. C. C. 220; Co. Litt. 246 a. n. (1); *Ireland v. Rittle*, 1 Atk. 541; although without a deed, the legal estate will still be held in joint tenancy; 2 Cru. Dig. 461, 3d edit. The effect of this section will be to abolish this distinction as to joint holders of property, by enacting that no partition of freehold or leasehold land shall be valid at law, unless the same shall be *by deed*, leaving the doctrine of courts of equity untouched. See 2 Bla. Com. 378.

As to *exchanges*, Lord Coke lays it down, that if the things exchanged lay in grant, that is, are incorporeal hereditaments, the exchange must be by deed. Co. Litt. 51 b. And now, by the Statute of Frauds, 29 Car. II. c. 3, a deed or writing is in all cases necessary to an exchange where the interests exchanged are for less than three years. Before that Statute, an exchange of corporeal hereditaments might have been made by *parol*, and was perfected by the entry of each party on the lands respectively received in exchange; and in the exchange of freeholds in possession no livery of seisin was necessary. Litt. s. 62. By this section of the present Act, no exchange of freehold or leasehold land shall be valid at law,

Leases and  
Surrenders in  
writing to be  
by Deed.

IV. That no lease, in writing, of any freehold, copyhold or leasehold land, or surrender in writing of any freehold or leasehold land, shall be valid as a lease or surrender, unless the same shall be made by deed; but any agreement in writing to let or to surrender any such land, shall be valid and take effect as an agreement to execute a lease or surrender;<sup>d</sup> and the person who shall be in the possession

unless the same shall be by *deed*. See 2 Bla. Com. 377, 373. As to *assignments* at common law, where the estate could only have been created by deed, as in the case of incorporeal hereditaments, it must have been assigned by deed; but when the estate could have been created by parol, the assignment might have been by parol. This distinction was partly done away by the Statute of Frauds, s. 3, which enacted, that no leases, estates, or interests, &c. in to or out of any messuage, &c. shall be *assigned*, unless it be by deed or note in writing, signed by the party so assigning, &c. or their agents lawfully authorised by writing, or by act and operation of law. And by this section of the present Act, *no assignments* of any freehold or leasehold lands shall be valid in law, unless the same shall be by *deed*. It may be observed, that assignments of personal chattels are unaffected by the Act, which also leaves untouched assignments of trusts, which, by s. 9 of the Statute of Frauds, are to be in *writing*.

<sup>d</sup> By the Statute of Frauds, sec. 1, it is enacted that all leases, estates, and interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents, lawfully authorised by writing, shall have the force and effect of leases or estates at will only except (sec. 2) nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-third parts of the full improved value. The above section makes a material alteration in this part of the Statute of Frauds, by enacting that *no lease in writing of land shall be valid as a lease, unless the same shall be by deed*, but it provides that every agreement to let any such land shall be valid as an agreement to execute a lease. Courts of law have of late years leaned as much as possible against construing demises where no certain term is mentioned to be tenancies at will, but have rather held them to be tenancies from year to year so long as both parties please, especially when an annual rent is reserved; in which case they will not suffer either party to determine the tenancy even at the end of the year without reasonable notice to the other, which is generally understood to be six months, and this leaning has gone so far of late, that

of the land in pursuance of any agreement to let, may, from payment of rent or other circumstances, be construed to be a tenant from year to year.

V. That any person may convey,\* assign or charge, by any deed any such contingent or executory interest, right of entry

Contingent  
Interests may  
be conveyed  
by Deed.

some have doubted whether an estate at will can ever exist; but it is quite clear that it may be created by the express contract of the parties, *Richardson v. Langridge*, 4 Taunt. 128; although it is also well settled that what was formerly a tenancy at will by implication shall now be considered a tenancy from year to year, determinable by half a year's notice expiring at the end of the current year. 2 Black. Com. 168, 169, and the authorities there cited. By the above section it seems intended to leave this understanding unaffected, as it is enacted that the person who shall be in the possession of the land in pursuance of any agreement to let, may, from payment of rent or other circumstances be construed to be a tenant from year to year. By the Statute of Frauds sec. 3, it is enacted that no lease, &c. not being copyhold, shall be *surrendered* unless it be by deed or note in writing, signed by the party or his agent. By the present section this is also altered, it being enacted that no surrender in writing of any freehold or leasehold land shall be valid, unless the same shall be by *deed*, but any agreement in writing to surrender, shall be valid as an agreement to surrender.

\* The law on the subject of this section is thus stated in the second volume of Blackstone, 3rd edition, p. 339, "Reversions and vested remainders may be granted, because the possession of the particular tenant is the possession of him in reversion or remainder; but contingencies and mere possibilities, though they may be released or devised by will, or even pass to the heir or executor, yet could not (it has been said) be assigned to a stranger at law unless coupled with some present interest, although they may be assigned in equity, or bound at law by way of estoppel." See the authorities there cited. The law as to this will be altered by the present section, by which contingent or executory interests, rights of entry for condition broken, or other future estate or interest, may be conveyed, assigned, or charged by deed; and the person to whom the same is conveyed or assigned, is to have the same rights as the person making the conveyance or assignment: but this is not to extend to the dispositions of expectancies as heir in real or next of kin in personal estate, nor to any right or interest under the will of a living person, or a deed thereafter to be executed; neither is it to render a chose in action assignable at law: as to the present mode of assigning choses in action, see 2 Bla. Com. 499.

for condition broken, or other future estate or interest as he shall be entitled to, or presumptively entitled to, in any freehold, or copyhold or leasehold land, or personal property, or any part of such interest, right or estate respectively; and every person to whom any such interest, right or estate shall be conveyed or assigned, his heirs, executors, administrators or assigns, according to the nature of the interest, right or estate, shall be entitled to stand in the place of the person by whom the same shall be conveyed or assigned, his heirs, executors, administrators or assigns, and to have the same interest, right or estate, or such part thereof as shall be conveyed or assigned to him, and the same actions, suits, and remedies for the same, as the person originally entitled thereto, his heirs, executors or administrators, would have been entitled to if no conveyance, assignment or other disposition thereof had been made; provided that no person shall be empowered by this Act to dispose of any expectancy which he may have as heir, or heir of the body inheritable, or as next of kin, under the statutes for the distribution of the estates of intestates of a living person, nor any estate, right or interest to which he may become entitled under any deed thereafter to be executed, or under the will of any living person, and no deed shall by force of this Act bar or enlarge any estate tail: Provided also, That no chose in action shall by this Act be made assignable at law.

No Implied  
Warranty to

VI. That neither the word "Grant"<sup>f</sup> nor the word

<sup>f</sup> According to an opinion of Sir Jeffrey Palmer, cited in Bridgman's Complete Conveyancer, vol. i. p. 323, "The word *grant* in a lease for years is a covenant in law or (as you may call it) a general warranty, if it be not qualified by a *covenant* or *warranty in fait*; but if there be a *covenant* or *warranty in fait*, then it is restrained to the words of the *covenant* subsequent," &c. This opinion rendered it doubtful whether trustees could safely use the word *grant*. Mr. Butler, in his note to Co. Litt. 384 a. (n. 1.) to which the reader is referred, after discussing this opinion at length, says, "Upon the whole it appears clear that whenever there is a deed on the face of which a trustee is a party and conveys merely as trustee, there is no substantial objection to his conveying



"Exchange" in any deed shall have the effect of creating any warranty or right of re-entry, nor shall either of such words have the effect of creating any covenant by implication, except in cases where by any Act of Parliament it is or shall be declared that the word "Grant" shall have such effect. <sup>be created by "Grant" or "Exchange."</sup>

VII. That no conveyance<sup>s</sup> shall be voidable only when No Convey.

by the word "grant." If the lands are freehold, it is clear that no warranty or covenant is imported by it; if it happens that they are held for a term of years only, all implication of an intention or undertaking to convey them for the term is necessarily rebutted by their being treated in the deed and conveyed by the party as a fee-simple estate; and if any such warranty or covenant would otherwise be implied, it would be restrained by his covenant that he himself has done no act to incumber to a warranty or covenant against his own acts." To remove all doubt on this point, it is now enacted by the present section, that the word "grant" shall not have the effect of creating a warranty, or right of re-entry, nor create any covenant by implication. As to the word "exchange," its effect was more important in practice. The law is thus stated in Blackstone: "The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. \* \* \* If after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange through defect of the other's title, he shall return back to the possession of his own by virtue of the implied warranty contained in all exchanges. But although this warranty and right of re-entry are incident to an exchange at common law, it has been considered doubtful by some whether they are incident to an exchange effected by mutual conveyances under the statute of uses. Mr. Cruise appears to think that they are so incident. But when mutual conveyances are used, the one in consideration of the other, the incidents of an exchange may be avoided and the objects retained; but in such cases the word 'exchange' need not and should not be used." Vol. ii. p. 378, 3rd ed. The present section will obviate the difficulty arising from the implied warranty, which was a great inconvenience in practice, as it necessitated in many cases the production of a double title, as well of the lands given, as of those received in exchange.

<sup>s</sup> This section will abolish an important distinction between the assurances now in force, which will be found to have been alluded to

ances to  
operate by  
wrong, or  
have greater  
effect than a  
release.

made by feoffment or other assurance where the same would be absolutely void if made by release or grant; and that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised (as the case may be.)

Contingent  
Remainders  
abolished.  
Executory  
Devises or

VIII. That after the time at which this Act shall come into operation, no estate in land shall be created by way of contingent remainder; but every estate which before that

in the course of the 22nd chapter of Blackstone. Thus it is said, p. 369, "A feoffment has of late been generally resorted to in practice rather for its peculiar powers and effects than as a simple mode of assurance from one person to the other. Thus a feoffment by a particular tenant, destroys the contingent remainders depending on the particular estate, and if made by a tenant in tail in possession discontinues the estate tail, and until lately it seemed quite settled that a feoffment might be employed to convey a fee to the feoffee by disseisin, whatever might have been the estates of the feoffor, provided he had possession of the land enfeoffed. But this doctrine must now be considered to be greatly shaken, and a feoffment cannot be said to have any longer this effect:" and again referring to a bargain and sale, p. 383, "A bargain and sale is also what is termed an *innocent* conveyance, and operates only on what the grantor may lawfully convey. It will not therefore create a forfeiture or destroy contingent remainders dependent upon a particular estate." See also as to other assurances, pp. 383—385. As to deeds being "void" or "voidable," see also pp. 341—343. These distinctions will be at an end by the operation of the present section, by which the feoffment will be deprived of its peculiar operation, which will probably lead to its entire disuse.

<sup>b</sup> This is an important section, and remedies a gross defect in the present law, although it was usually provided for by a clause in family settlements. The rules as to vested and contingent remainders are to be found 2 Bla. Com. p. 202. The hardship which this section will remedy, is thus alluded to. "Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend before the contingency happens whereby they become vested. Therefore, when there is tenant for life, with divers remainders in contingency, he may not only by his death, but by feoffment, and also fine or recovery (when these assurances existed,) by surrender or other methods, destroy and determine his own life estate before any of those remainders

time would have taken effect as a contingent remainder, shall take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature, and having the same properties as an executory devise; and contingent remainders existing under deeds, wills, or instruments executed or made before the time when this Act shall come into operation, shall not fail or be destroyed or barred merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine.

*Estates.  
Existing  
Contingent  
Remainders  
to continue.*

IX. That when any person entitled to any freehold or *Executor or*

vest; the consequence of which is, that he utterly defeats them all. . . . In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders, in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees for the residue of his natural life will then take effect, and become a particular estate in possession sufficient to support the remainders depending in contingency." p. 206. But if this limitation to trustees were omitted, the contingent remainders might be destroyed.

By the present section, no estate in land is in future to be created by way of contingent remainder; but all estates which would have taken effect as a contingent remainder, shall take effect, and have the properties of, an executory devise. As to these properties, see 2 Blackstone, pp. 207—210; and one of these, in which an executory devise differs from a remainder is, "That it needs not any particular estate to support it." p. 207. It is also to be observed, that this clause of the Act, and this alone, has a retrospective effect, as it enacts, that contingent remainders existing before this Act, either under deeds or wills, are not to be destructible by the determination of any preceding estate, otherwise than by its natural effluxion.

This clause may have a very material effect on the present practice of conveyancing, and some of the usual forms will be subject to alteration. The usual form of limitation to trustees to preserve contingent remainders will probably be omitted.

<sup>1</sup> This clause will remedy an obvious defect in the law of mortgages, which is alluded to in 2 Bla. Com. 191, in mentioning the comparative advantages of a mortgage in fee, and for a term of

Administrator of Mortgagee empowered on discharge of Mortgage to convey the legal estate vested in the Heir or Devisee.

copyhold land by way of mortgage has or shall have departed this life, and his executor or administrator is or shall be entitled to the money secured by the mortgage, and the legal estate in such land is or shall be vested in the heir or devisee of such mortgagee, or the heir, devisee, or other assign of such heir or devisee, and possession of the land shall not have been taken by virtue of the mortgage, nor any action or suit be depending, such executor or administrator shall have power, upon payment of the principal money and interest due to him on the said mortgage, to convey by deed or surrender (as the case may require) the legal estate which became vested in such heir or devisee; and such conveyance shall be as effectual as if the same had been made by any such heir or devisee, his heirs or assigns.

Receipts of Trustees to be effectual discharges.

X. That the bonâ fide payment to and the receipt<sup>k</sup> of any person to whom any money shall be payable upon any express or implied trust, or for any limited purpose, or of the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the

years, "The only obvious advantage to the mortgagee in a term of years is, that on his decease, the lands devolve on his personal representatives, who are also entitled to the beneficial interest in the mortgage sum." This advantage will, after the 1st of January next, be enjoyed in a mortgage in fee, and the executor or administrator of a mortgagee will be empowered on discharge of the mortgage to convey the legal estate vested in the heir and devisee.

<sup>k</sup> It has been usual when money is to be paid to trustees to insert a clause in the instrument under which they act, making their receipts sufficient discharges; however, it may sometimes be the intention of the parties that their receipts should not have this effect. The clause inserted in the first print of this bill was a general provision, that the receipts of trustees should always have this effect. The present clause is somewhat restricted in its terms, and it provides, that a contrary intention may be expressed in the instrument creating the trust or security.

contrary shall be expressly declared by the instrument creating the trust or security.

XI. That it shall not be necessary in any case to have a deed indented;<sup>1</sup> and that any person, not being a party to any deed, may take an immediate benefit under it in the same manner as he might under a deed poll.

Indenting a Deed unnecessary.

XII. That where the reversion<sup>m</sup> of any land, expectant on a lease, shall be merged in any remainder or other reversion or estate, the person entitled to the estate into which such reversion shall have merged, his heirs, executors, administrators, successors and assigns, shall have and enjoy the like advantage, remedy, and benefit against the lessee, his heirs, successors, executors, administrators and assigns, for non-payment of the rent, or for doing of waste or other forfeiture, or for not performing conditions, covenants or agreements contained and expressed in his lease, demise or grant, against the lessee, farmer or grantee, his heirs, successors, executors, administrators and assigns, as the person who would for the time being have been entitled to the mesne reversion which shall have merged would or might have had and enjoyed if such reversion had not been merged.

The remedies for the Rent and Covenants in a Lease not to be extinguished by the merger of the immediate reversion.

<sup>1</sup> After this clause comes into operation, we shall rarely hear of indentures. The indenting a deed has been long considered a useless form (see 2 Black. Comm. 348) and has on occasion been supplied by a Judge with a pair of scissors. This section also abolishes the present distinction between indentures and deeds poll, under the former, of which it was considered that no person not being a party could take an immediate interest. After the 1st of January it is to be presumed that the form invariably will be "This deed made the — day of — between, &c." A doubt may arise whether, where an indenture is expressly directed by statute as in the Mortmain Act, 9 Geo. 2, c. 35, this provision is repealed.

<sup>m</sup> This clause is intended to remedy the practical injustice of the following rule:— When a person makes a lease for years at a rent, and the estate out of which the lease is created becomes merged, so that the relation of landlord and tenant ceases as between the parties, the remedy for the rent, and for covenants

Act to com-  
mence from  
31 December  
1844.

**XIII.** That this Act shall commence and take effect from the thirty-first day of December, one thousand eight hundred and forty-four, and shall not extend to any deed, act or thing executed or done, or (except so far as regards the provisions hereinbefore contained as to existing contingent remainders) to any estate, right, or interest created before the first day of January one thousand eight hundred and forty-five.

Act not to  
extend to  
Scotland.

**XIV.** And be it enacted, That this Act shall not extend to Scotland.

annexed to the reversion will cease with the reversion to which the rent and covenants were annexed and incident. *Lord Treasurer v. Baron, Moor, 94 ; Webb v. Russell, 3 T. R., 393 ; Stokes v. Russell, 3 T. R. 678.* This difficulty is provided for in enfranchisements of copyholds, under the Copyhold Act, 4 & 5 Vict. c. 35, by the Amendment Act, 6 & 7 Vict. c. 23, ss. 9 & 10 ; and now, by the present section, the remedies for the rent and covenants in a lease are not to be extinguished by the merger of the immediate reversion.

LONDON :

G. J. PALMER, SAVOY STREET, STRAND.

AN ACT  
TO  
AMEND THE LAW  
OF  
REAL PROPERTY.

8 & 9 VICT. c. 106.

*An Act to amend the Law of Real Property.*

[4th August, 1845.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows; (that is to say,)

I. That so much of an Act passed in the last Session of Parliament, intituled *An Act to simplify the Transfer of Property*, as enacted that, after the Time at which that Act should come into operation, no Estate in Land should be created by way of contingent Remainder; but that every Estate which, before that Time, would have taken effect as a contingent Remainder should take effect (if in a Will or Codicil) as an executory Devise, and (if in a Deed) as an executory Estate of the same Nature, and having the same Properties, as an executory Devise; and that contingent Remainders existing under Deeds, Wills, or Instruments, executed or made before the Time when that Act should come into operation, should not fail, or be destroyed or barred, merely by reason of the Destruction or Merger of any preceding Estate, or its Determination by any other Means than the natural Effluxion of the Time of such preceding Estate, or some Event on which it was

Repeal of so much of 7 & 8 Vict. c. 76, as abolishes contingent Remainders as from the Commencement:

and the Residue as from 1st Oct. 1848. in its Creation limited to determine, shall be and is hereby repealed, as from the Time of the Commencement and taking effect thereof; and that the Residue of the said Act shall be and is hereby repealed, as from the First Day of *October* One thousand eight hundred and forty-five.\*

The immediate Freehold of corporeal Tenements to lie in Grant as well as in Livery. Stamp Duty on Grants thereof.

II. That, after the said First Day of *October* One thousand eight hundred and forty-five, all corporeal Tenements and Hereditaments shall, as regards the Conveyance of the immediate Freehold thereof, be deemed to lie in Grant as well as in Livery; and that every Deed which, by force of this enactment, shall be effectual as a Grant, shall be chargeable with the Stamp Duty with which the same Deed would have been chargeable in case the same had been a Release, founded on a Lease or Bargain and Sale for a Year, and also with the same Stamp Duty (exclusive of progressive Duty) with which such Lease or Bargain and Sale for a Year would have been chargeable.<sup>b</sup>

Foofments, Partitions, Exchanges, Leases, Assignments, and Surrenders required

III. That a Feoffment, made after the First Day of *October* One thousand eight hundred and forty-five, other than a Feoffment made under a custom by an Infant, shall be void at Law, unless evidenced by Deed; and that a Partition, and an Exchange, of any Tenements or Hereditaments, not being Copyhold, and a Lease, required by Law to be in Writing, of any Tenements or Hereditaments,

\* By this Section, s. 8 of the 7 & 8 Vict. c. 26, ante, p. 12, is repealed from the time of the commencement, and taking effect thereof, and the residue of the act is repealed from the 1st of October next.

<sup>b</sup> All corporeal hereditaments are said to lie *in livery*, and in corporeal hereditaments to lie *in grant*, see 2 Bla. Com. p. 370, 3rd. ed. By this section all corporeal tenements and hereditaments shall as regards the immediate freehold thereof, be deemed to lie in grant as well as in livery. The intended effect of this clause is to render the assurance by grant, (as to which see 2 Bla. Com. p. 370, 3rd ed.) applicable to the conveyance of *all* hereditaments, it may thus supersede the lease and release, which has been hitherto used for this purpose, see 2 Bla. Com. 285. All deeds which by force of this enactment shall be effectual as a grant are to be chargeable with the same stamp-duty as a lease and release. This section may be considered to be in lieu of the second section of the 7 & 8 Vict. c. 76.



and an Assignment of a Chattel Interest, not being Copyhold, in any Tenements or Hereditaments, and a Surrender in Writing of an Interest in any Tenements or Hereditaments, not being a Copyhold Interest, and not being an Interest which might by Law have been created without Writing, made after the said First Day of *October* One thousand eight hundred and forty-five, shall also be void at Law, unless made by Deed: Provided always, that the said Enactment so far as the same relates to a Release or a Surrender shall not extend to *Ireland*.<sup>c</sup>

<sup>c</sup> In reading this section, the following provisions of the Stat. of Frauds must be borne in mind.

By s. 1, of this stat. (29 Car. 2, c. 3,) it is enacted, that "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of in to or out of any messuages, manors, lands, tenements, or hereditaments made or created by livery and seisin only, or by parol and not *put in writing*, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estate or any former law or usage to the contrary notwithstanding.

II. "Exempting nevertheless all leases not exceeding the term of *three years* from the making thereof, wherefrom the rent reserved to the landlord during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

III. "And moreover that no leases, estates, or interests, either of freehold or terms of years or any uncertain interest, not being copyhold or customary interest, of in to or out of any messuages, manors, land, tenements or hereditaments shall be assigned granted or surrendered, unless it be by deed or *notice in writing* signed by the agents so assigning granting or surrendering the same or other part thereunto lawfully authorized by writing or by act and operation of law."

The third section of the present Act makes certain alterations in these provisions, as follows: feoffments, except under a custom by an infant, must not only be evidenced by a note in writing, but must be *by deed*.

Partitions and exchanges of any tenements or hereditaments, not being copyhold, must be *by deed*. (As to these assurances see ante, p. 7, n. c.) All leases required by the Statute of Frauds or any other law to be *in writing* must be *by deed*. (See as to these assurances, ante, p. 8, note d.)

Feoffments  
not to operate  
by Wrong, nor  
Exchanges  
or Partitions  
to imply any  
Condition,  
or give and  
grant any  
Covenant.

IV. That a Feoffment, made after the said First Day of *October* One thousand eight hundred and forty-five, shall not have any tortious Operation; and that an Exchange, or a Partition, of any Tenements or Hereditaments, made by Deed, executed after the said First Day of *October* One thousand eight hundred and forty-five, shall not imply any Condition in Law; and that the Word "give" or the Word "grant," in a Deed, executed after the same Day, shall not imply any Covenant in Law, in respect of any Tenements or Hereditaments, except so far as the Word "give" or the Word "grant" may, by force of any Act of Parliament, imply a Covenant.<sup>d</sup>

Strangers  
may take  
immediately  
under an  
Indenture,  
and a Deed  
purporting to  
be an Inden-  
ture shall  
take effect  
as such.

V. That, under an Indenture, executed after the First Day of *October* One thousand eight hundred and forty-five, an immediate Estate or Interest, in any Tenements or Hereditaments, and the Benefit of a Condition or a Covenant, respecting any Tenements or Hereditaments, may be taken, although the Taker thereof be not named a Party to the same Indenture; also, that a Deed, executed after the said First Day of *October* One thousand eight hundred and forty-five, purporting to be an Indenture, shall have the Effect of an Indenture although not actually indented.<sup>e</sup>

VI. That, after the First Day of *October* One thousand

Assignments of a chattel interest not being copyhold in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments not being a copyhold interest, and not being an interest which might by law have been created without writing, must be made *by deed*. (As to these assurances see ante, p. 8, note c, ad fin., and note d.)

This third section of the present Act must be considered to be a substitution and enlargement in some particulars, and in others a qualification, of ss. 3 & 4 of the repealed Act.

<sup>d</sup> This section must be considered to be in substitution of ss. 6 & 7 of the repealed Act. See ante, p. 10—12, and notes *f* and *g*. It enacts that a feoffment shall not have any tortious operation; that an exchange or a partition made by deed shall not imply any conditions in law; that the words "give" or "grant" in a deed shall not imply any covenant in law, in respect of any tenements or hereditaments, except by force of any Act of Parliament.

<sup>e</sup> This section is in substitution for s. 11 of the repealed Act

eight hundred and forty-five, a contingent, an executory, and a future Interest, and a Possibility coupled with an Interest, in any Tenements or Hereditaments of any Tenure, whether the Object of the Gift or Limitation of such Interest or Possibility be or be not ascertained, also a right of Entry, whether immediate or future, and whether vested or contingent, into or upon any Tenements or Hereditaments in *England*, of any Tenure, may be disposed of by Deed; but that no such Disposition shall, by force only of this Act, defeat or enlarge an Estate Tail; and that every such Disposition by a married Woman shall be made conformably to the Provisions, relative to Dispositions by married Women, of an Act passed in the Third and Fourth Years of the Reign of His late Majesty King *William* the Fourth, intituled *An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance*, or in *Ireland* of an Act passed in the Fourth and Fifth Years of the reign of His said late Majesty, intituled *An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance*, in *Ireland*.<sup>f</sup>

Contingent and other like Interests, also Rights of Entry, made alienable by Deed, saving Estates in Tail; and as regards married Women enjoining conformity to s. 3 & 4 W. 4, c. 74.

4 & 5 W. 4, c. 92.

VII. That, after the First Day of *October* One thousand eight hundred and forty-five, an Estate of Interest in any Tenements or Hereditaments in *England*, of any Tenure, may be disclaimed by a married Woman by Deed; and that every such Disclaimer shall be made conformably to the said Provisions of the said Act for the Abolition of Fines and Recoveries and for the Substitution of more Modes of Assurance.<sup>g</sup>

Capacity of Married Women to disclaim Estates or Interests by Deed extended to *England*.

(which see ante, p. 15, and note *f*). It is to be observed that it was very doubtful whether under the former Act the words "This Indenture" could be dispensed with; and under the present Act it will be improper to use any other words in substitution, as the deed, to have the effect of an Indenture, must "purport to be an Indenture."

<sup>f</sup> This section is in substitution for s. 5 of the repealed Act (which see ante, p. 9, and note *e*.)

<sup>g</sup> The object of this clause is not attempted to be attained by any part of the repealed Act. This, therefore, is an entirely new clause.

Contingent  
Remainders  
protected as  
from 28 Dec.  
1844, against  
the prema-  
ture Failure  
of a pre-  
ceding Es-  
tate.

VIII. That a contingent Remainder, existing at any Time after the Thirty-first Day of *December* One thousand eight hundred and forty-four, shall be, and, if created before the passing of this Act, shall be deemed to have been, capable of taking effect, notwithstanding the Determination, by Forfeiture, Surrender, or Merger, of any preceding Estate of Freehold in the same Manner, in all respects, as if such Determination had not happened.<sup>b</sup>

When the  
Reversion  
on a Lease is  
gone the  
next Estate  
to be deemed  
the Rever-  
sion.

IX. That when the Reversion expectant on a Lease, made either before or after the passing of this Act, of any Tenements or Hereditaments, of any Tenure, shall, after the said First Day of *October* One thousand eight hundred and forty-five, be surrendered, or merge, the Estate which shall for the Time being confer as against the Tenant under the same Lease the next vested Right to the same Tenements or Hereditaments, shall, to the Extent and for the Purpose of preserving such Incidents to, and Obligations on, the same Reversion, as, but for the Surrender or Merger thereof, would have subsisted, be deemed the Reversion expectant on the same Lease.<sup>i</sup>

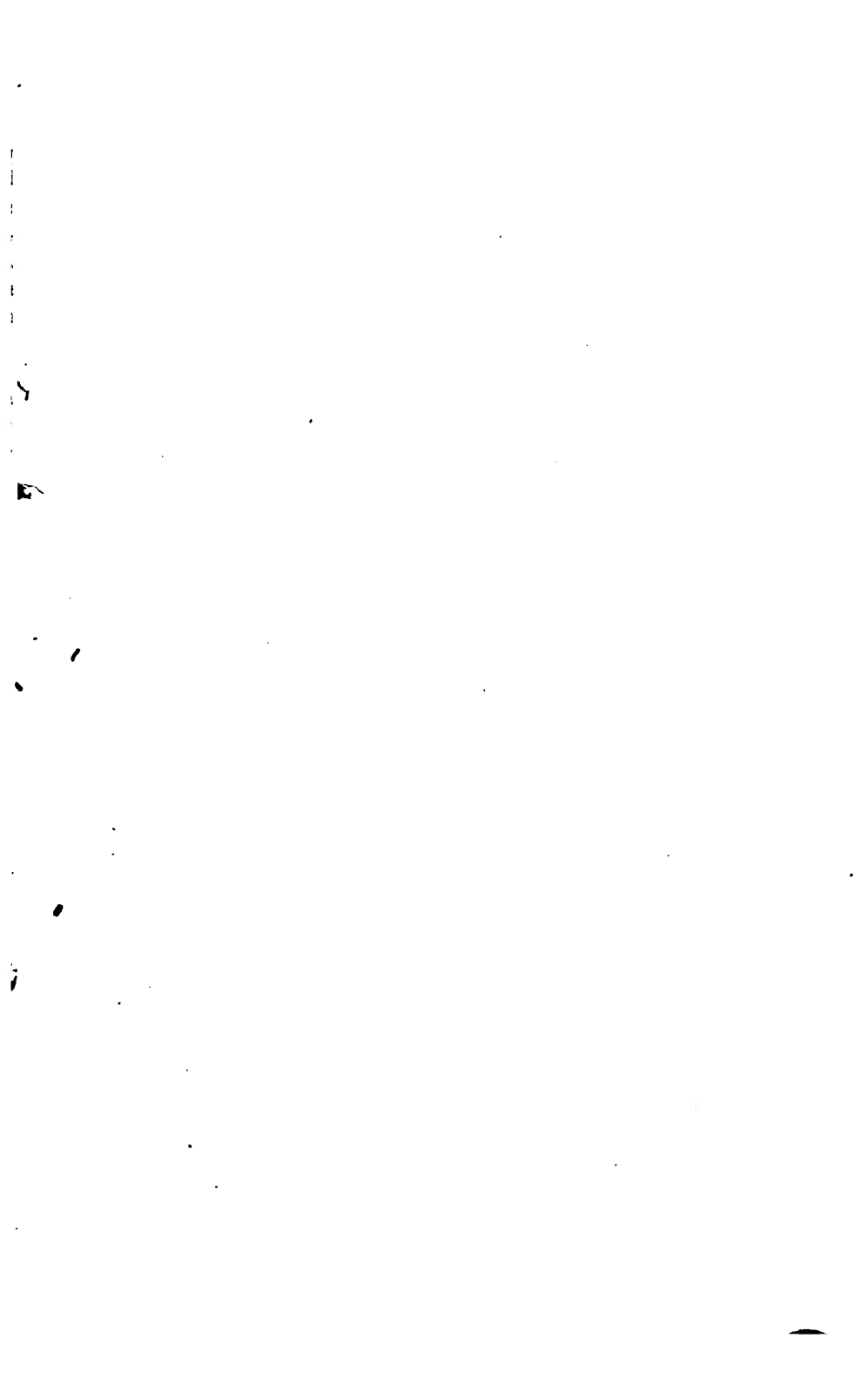
Act not to  
extend to  
Scotland.

X. That this Act shall not extend to *Scotland*.

It is a useful provision, and may be considered as supplying an omission in the Stat. 3 & 4 W. 4, c. 74, as to which see 2 Bla. Com. p. 343, 3rd. edit.

<sup>b</sup> This section is in substitution for s. 8 of the repealed Act (which see, s. 8 and note *h*.) It is to be observed that this section is repealed from the time of its commencement and taking effect. (s. 1.)

<sup>i</sup> This section is in substitution for s. 12 of the repealed Act (which see, ante, p. 15, and note *m*.)





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